133-138

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~303~~. 42

BENJAMIN U. KEYSER, RECEIVER OF THE GERMAN AMERICAN NATIONAL BANK OF WASHINGTON, D. C., PLAINTIFF IN ERROR,

vs.

JANE C. HITZ.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JULY 26, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 303.

BENJAMIN U. KEYSER, RECEIVER OF THE GERMAN AMERICAN NATIONAL BANK OF WASHINGTON, D. C., PLAINTIFF IN ERROR,

vs.

JANE C. HITZ.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Caption	1	1
Declaration	1	1
Summons	5	3
Marshal's return	6	3
Pleas	6	4
Joinder of issue and demurrer to 3d plea	8	5
Joinder in demurrer to 3d plea	9	5
Note of issue	9	5
Order overruling demurrer	10	5
Replication to 3d plea	11	6
Rejoinder	11	6
Joinder of issue to rejoinder	12	7
Fourth plea	12	7
Joinder of issue on fourth plea	13	7
Trial	14	8
Judgment of special term	15	8
Motion for new trial	15	9
Order allowing bill of exceptions	16	9
Bil of exceptions	17	9
Testimony of Benj. U. Keyser	17	9
Certificate of incorporation of German American Savings Bank	36	24
Testimony of Wm. F. Mattingly	38	25
R. B. Donaldson	39	26

JUDD & DETWEILER, PRINTERS, WASHINGTON, JANUARY 3, 1889.

	Original.	Print.
Testimony of Wm. F. Mattingly (recalled)	41	27
Benj. U. Keyser (recalled)	41	27
Jane C. Hitz	44	30
Second bill of exceptions	51	34
Prayer of defendant and exceptions	51	34
Third bill of exceptions	52	35
Prayer of defendant and exceptions	52	35
Fourth bill of exceptions	52	35
Prayer of defendant and exceptions	53	35
Fifth bill of exceptions	53	36
Prayer of defendant and exceptions	53	36
Sixth bill of exceptions	54	36
Prayer of defendant and exceptions	54	37
Prayers of plaintiff and exceptions	55	37
Seventh bill of exceptions	56	37
Charge to the jury	56	37
Judgment of general term	61	40
Bond	62	41
Writ of error	63	41
Citation and proof of service of same	63	41
Certificate to record	64	42

1 *Transcript of Record.*

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the times hereinafter mentioned, among others, were the following proceedings, to wit:

Declaration. Filed Sep. 17, 1880.

In the Supreme Court of the District of Columbia, the 17 Day of September, A D. 1880.

BENJAMIN U. KEYSER, Receiver of the German-American National Bank of Washington, D. C., Plaintiff, *vs.* JANE C. HITZ, Defendant. } At Law. No. 22261.

The plaintiff is the duly appointed and qualified receiver of the German-American National Bank of Washington, D. C., appointed by the Comptroller of the Currency, in pursuance of the laws of the United States; as a receiver aforesaid, sues the defendant for money due and payable by the defendant to the plaintiff, for that whereas heretofore, to wit, on the 30th day of October, A. D. 1878, the said German-American National Bank, a banking association organized under the laws of the United States and doing business in the city of Washington aforesaid, failed and suspended payment, and thereupon the plaintiff was duly appointed receiver, as afore-
2 said, and has so continued, and is now receiver of said bank.

And the plaintiff further alleges that at the time of the failure or suspension of said bank the defendant held or owned two hundred (200) shares of the stock of the said banking association, of the par value per share of one hundred dollars ($100), in the aggregate twenty thousand (20,000) dollars, by reason whereof the defendant became liable in the sum of money equal to the par value of said shares of stock, to be paid upon the assessment or requisition of the Comptroller of the Currency, in accordance with the twelfth section of the act of Congress entitled "An act to provide a national currency," approved June 3, 1864, and section 5151 of the Revised Statutes of the United States, approved June 22, 1874.

And the plaintiff further alleges that on the 11 day of June, A. D. 1880, the Comptroller of the Currency did make said assessment or requisition in the words and figures following, to wit:

UNITED STATES TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., *June* 11, 1880.

In the Matter of the GERMAN-AMERICAN NATIONAL BANK OF WASHINGTON, D. C.

To all whom it may concern:

This is to certify that I have taken an accounting of the condi-

tion of the estate of the German-American National Bank of Washington, D. C., aforesaid, and of its assets and liabilities, and I do find and determine, upon data satisfactory to me, that in order
3 to provide the money necessary to pay the debts of the association it is necessary now to enforce, to the extent hereinafter mentioned, the individual liability of the shareholders of said association, provided for by the twelfth section of the act of Congress entitled "An act to provide a national currency," approved June 3rd, 1864, and by section 5151 of the Revised Statutes of the United States, approved June 22, 1874; and to that end and in pursuance of the powers vested in me by the said acts, I have made and do hereby order and make an assessment or requisition upon the shareholders of said association or bank and each and every one of them, equally and ratably, to the amount of one hundred dollars per centum ($100 per cent.) of the par value of the shares of the capital stock in the said association held or owned by them respectively at the time of its failure or suspension, and I direct Benjamin U. Keyser, the receiver heretofore appointed of the said association, to take the necessary proceedings by suit or otherwise to enforce to that extent the said individual liability of the said shareholders.

In witness whereof I have set my hand and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this 11th day of June, one thousand eight hundred and eighty.

[L. S.] JOHN JAY KNOX,
Comptroller of the Currency.

And the plaintiff further alleges that the defendant was duly notified of said assessment or requisition, and that said notice was as follows:

4 OFFICE OF THE RECEIVER OF THE
GERMAN-AMERICAN NATIONAL BANK OF WASHINGTON, D. C.,
WASHINGTON, D. C., *June 11th*, 1880.

You will please take notice that the Comptroller of the Currency has levied an assessment upon the stockholders of the German-American National Bank of Washington of one hundred dollars ($100) a share, payable at the office of the receiver, as follows:

Fifty dollars ($50) a share within thirty days from the date hereof.

Fifty dollars ($50) a share within sixty days from the date hereof.

You are therefore requested to pay the amount of your assessment according to the aforesaid notice; otherwise suit will be commenced to enforce its collection within thirty days of the date hereof.

BENJAMIN U. KEYSER, *Receiver.*

Nevertheless the plaintiff alleges that said defendant has not paid said assessment or any part thereof, and that plaintiff has become and is entitled to recover the same; wherefore the plaintiff claims twenty thousand dollars ($20,000), with interest on $10,000 from July 11th, 1880, and on $10,000 from August 11, 1880, besides costs, and therefore he brings his suit.

ELLIOT & ROBINSON.
For Plaintiff.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

E. & R., *For Plaintiff.*

B. U. Keyser makes oath that he is the plaintiff named in the foregoing and annexed declaration; that the action therein described arises under the laws of the United States on defendant's obligation to pay the amount claimed by reason of the facts set forth in said declaration, and that the sum therein claimed, with interest as specified, is justly due plaintiff by defendant, exclusive of all set-offs and just grounds of defense.

B. U. KEYSER.

Subscribed and sworn to before me this 17th day of September, A. D. 1880.

R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Ass't Clerk.*

Summons. Issued Sept. 17th, 1880.

In the Supreme Court of the District of Columbia, the 17 Day of September, 1880.

BENJAMIN U. KEYSER, Receiver of the German-American National Bank of Washington, D. C., Plaintiff,
vs.
JANE C. HITZ, Defendant.
} At Law. No. 22261.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court on the first day of its first special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness. D. K. Carter, chief justice.

R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Ass't Clerk.*

NOTE.—The special terms of the court commence on the first Tuesday of every month, except August, in which month there is no term of the court.

ELLIOT AND ROBINSON.

Marshal's Return.

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant the 18th day of Sept., 1880.

F. DOUGLASS, *Marshal.*

Pleas and Affidavit. Filed Nov. 2, 1880.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver, &c., *vs.* JANE C. HITZ. } Law No. 22261.

Pleas of defendant.

This defendant, for pleas to said declaration, says:

7 1. She never was indebted as alleged.

2. She says that it was not true that she held or owned, at the time of the failure or suspension of said bank, two hundred shares of the stock of the said banking association, and she says that she never owned or held any stock whatsoever in said German-American National Bank at the time it failed or suspended or at any other time; and she says that if it appear upon the books of said bank or otherwise that any of the stock thereof stands in the name of this defendant, that the entries and records of said bank, so far as they show stock in her name, are fraudulent, and such records and entries were made for the purpose of cheating and defrauding this defendant.

3. For a further plea this defendant says that she is now and has ever since the 15th day of August, 1856, been the wife of John Hitz, and that ever since that date she and her husband have resided and they still continue to reside in the city of Washington, in the District of Columbia, aforesaid.

ENOCH TOTTEN,
Att'y for the Defendant.

DISTRICT OF COLUMBIA, *County of Washington,* } *ss:*

Jane C. Hitz, being by me first duly sworn, doth depose and on her oath say that she is the wife of John Hitz, and has been his wife, residing in the said city, for more than twenty years last

8 past; that she is not indebted, directly or indirectly, to the German-American National Bank or to the plaintiff in this cause, and she says that she never either owned or held any of the stock of the German-American National Bank, and also says that she never purchased any of the said stock whatsoever and never authorized anybody to purchase any of the said stock for her or on her account.

JANE C. HITZ.

Subscribed and sworn to before me this 2 day of November, A. D. 1880.

R. J. MEIGS, *Clerk,*
By J. R. YOUNG, *Ass't Clerk.*

Joinder of Issue and Demurrer. Filed Nov. 10, 1880.

In the Supreme Court of the District of Columbia, the 8th Day of November, A. D. 1880.

BENJ. U. KEYSER, Receiver, &c., *vs.* JANE C. HITZ. } At Law. 22261.

1 & 2. The plaintiff joins issue upon defendant's first and second pleas; and as to the third plea—

3. The plaintiff says that it is bad in substance.

ELLIOT & ROBINSON,
For Plaintiff.

MEM.—The plaintiff will contend, on the hearing of the above demurrer, that the coverture of the defendant, as alleged, does not constitute a legal defence to this suit.

E. & R.

9 *Joinder in Demurrer to 3rd Plea. Filed Jan.* 8, 1881.

In the Supreme Court of the District of Columbia.

KEYSER, Receiver, *vs.* JANE C. HITZ. } No. 22261.

And now comes the said defendant, Jane C. Hitz, and says that the third plea heretofore filed by her is good in substance.

ENOCH TOTTEN,
For Jane C. Hitz.

Note of Issue. Filed Jan. 10, 1881.

In the Supreme Court of the District of Columbia, the 10th Day of January, A. D. 1881.

KEYSER, Receiver, *vs.* JANE C. HITZ. } At Law. No. 22261.

Last pleadings filed Jan'y 8, 1881.

ENOCH TOTTEN,
For Defendant.
ELLIOT & ROBINSON,
For Plaintiff.

The clerk will please place this cause on next trial calendar.

E. & R., *For Plaintiff.*

10 *Court Proceedings.*

Supreme Court of the District of Columbia.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing on the third Monday, being the sixteenth, day of October, A. D. 1882.

MONDAY, *October 16th*, 1882.

By order of Arthur MacArthur, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

* * * * * * *

Supreme Court of the District of Columbia.

SATURDAY, *December 9th, A. D.* 1882.

Session resumed, pursuant to adjournment, MacArthur, justice, presiding.

* * * * * * *

BENJ. U. KEYSER, Receiver, Pl'ff,
vs.
JANE C. HITZ, Def't. } At Law. No. 22261.

Upon hearing the plaintiff's demurrer to the defendant's third plea, it is considered that said demurrer be, and the same is hereby, overruled.

11 *Replication to Third Plea. Filed Jan.* 11, 1883.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver, &c.,
vs.
JANE C. HITZ. } Law No. 22261.

To the defendant's third plea the plaintiff says that the two hundred shares of stock in the German-American National Bank of Washington, D. C., by reason of the ownership of which the defendant became liable in the sum of money assessed by the Comptroller of the Currency against her and sued for herein, was at the time of the failure of said bank and continued to be the property of the defendant, owned by her in her own right, with the consent and permission of her husband.

ELLIOT & ROBINSON,
For Plaintiff.

Rejoinder. Filed Jan. 15, 1883.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver, &c.,
vs.
JANE C. HITZ. } At Law. No. 22261.

Rejoinder.

For rejoinder to the replication of the plaintiff to her third plea the defendant says that it is not true that said stock was
12 owned by her in her own right, with the consent of her said husband or otherwise, as in manner and form in such replication alleged and set forth.

ENOCH TOTTEN,
Att'y for Def't.

Joinder of Issue to Rejoinder to Pl'ff's Replication to 3rd Plea. Filed Feb. 10, 1883.

In the Supreme Court of the District of Columbia.

BENJ. U. KEYSER, Receiver, &c.,
vs.
JANE C. HITZ. } At Law. No. 22261.

The plaintiff joins issue upon defendant's rejoinder to plaintiff's replication to 3rd plea.

ELLIOT & ROBINSON,
For Plaintiff.

Fourth (Additional) Plea of Defendant. Filed Feb. 12, 1883.

In the Supreme Court of the District of Columbia.

BENJ. U. KEYSER, Receiver,
vs.
JANE C. HITZ. } Law. No. 22261.

Fourth plea of defendant.

And for a fourth plea this defendant says that there is not
13 now and there never was such a corporation or national banking association as the German-American National Bank, and she denies that said plaintiff is or ever was the receiver of such corporation or national banking association in manner and form as the said plaintiff in his said declaration has alleged.

ENOCH TOTTEN,
Att'y for Def't.

Joinder of Issue on Fourth Plea of Defendant Endorsed Thereon. Filed Feb'y 12, 1883.

The plaintiff joins issue on this plea.

E. & R., *For Plaintiff.*

Court Proceedings.

Supreme Court of the District of Columbia.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the third Monday, it being the 15th day, of October, A. D. 1883.

MONDAY, *October 15th*, A. D. 1883.

By order of Arthur MacArthur, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

* * * * * * *

14 Supreme Court of the District of Columbia.

WEDNESDAY, *November* 21, *A. D.* 1883.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

* * * * * * *

BENJAMIN U. KEYSER, Receiver, Pl'ff, vs. JANE C. HITZ, Def't. } At Law. No. 22261. Cal. 39.

Now again come here as well the plaintiff, by his attorneys, Messrs. Elliot and Robinson, as the defendant, by her attorney, Mr. Totten, and a jury of good and lawful men of this District, to wit, Upton H. Ridenour, Richard W. Grant, William Witthaft, William H. Ruff, William H. Gargas, Daniel O'Leary, James Ward, John W. Gray, Andrew H. Stockman, John H. Shepherd, Thomas J. Galt, and Andrew Goddard, who, being duly sworn to try the issues above joined, after hearing the evidence in the case, are respited until the meeting of the court to-morrow morning.

Supreme Court of the District of Columbia.

THURSDAY, *November* 22*d*, *A. D.*, 1883.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

* * * * * * *

15 BENJAMIN U. KEYSER, &c., Pl'ff, vs. JANE C. HITZ, Def't. } At Law. No. 22261. Cal. 39.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, on oath say they find said issues in favor of the defendant; therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff the costs of her defense, taxed at $——, and have execution thereof.

* * * * * * *

Supreme Court of the District of Columbia.

FRIDAY, *November* 23*rd*, *A. D.* 1883.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

* * * * * * *

Motion for a New Trial upon Exceptions. Filed November 23rd, 1883, and Entered upon the Minutes of the Court on the Same Day.

In the Supreme Court of the District of Columbia.

B. U. KEYSER, Receiver, &c., *vs.* JANE C. HITZ. } At Law. No. 22261.

And now comes the plaintiff and moves the court to grant
16 a new trial in this case upon exceptions taken at the trial.

ELLIOT & ROBINSON,
For Plaintiff.

* * * * * * *

Supreme Court of the District of Columbia.

WEDNESDAY, *December 5th, A. D.* 1883.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

* * * * * * *

BENJ. U. KEYSER, Pl'ff, *vs.* JANE C. HITZ, Def't. } At Law. No. 22261.

Now again comes here the plaintiff, by his said attorneys, and tenders to the court here his bill of exceptions to the rulings of the court on the trial of the case and prays that they may be duly signed, sealed, and made a part of the record, now for then; which is done accordingly.

17 *Bill of Exceptions. Filed Dec.* 5, 1883. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia. October Term, 1883.

BENJAMIN U. KEYSER, Receiver, &c., *vs.* JANE C. HITZ. } At Law. No. 22261.

NOV. 21ST, 1883.

At the trial of the above-entitled action the plaintiff, to maintain the issue on his behalf joined, was called and sworn as a witness, and gave evidence as follows:

By Mr. ROBINSON:

Q. You are the plaintiff in this case?
A. Yes, sir.
Q. Have you the certificate of your appointment as receiver?
A. I have.
Q. I wish you would produce it.
A. Here it is (producing paper).

Mr. ROBINSON: I now offer in evidence the certificate of the Comptroller of the Currency as to the appointment of Mr. Keyser as receiver:

"TREASURY DEPARTMENT,
"OFFICE OF COMPTROLLER OF THE CURRENCY,
"WASHINGTON, D. C., *November* 1, 1878.

"Whereas B. U. Keyser, national bank examiner, duly authorized and directed by me to examine the affairs of the German-American National Bank of Washington, located in the city of Washington and District of Columbia, has, after due examination of its affairs, reported to me that said bank is insolvent, and being satisfied that said bank is insolvent and unable to pay its just and legal debts:

"Now, therefore, I, John Jay Knox, Comptroller of the Currency, in pursuance of the power and authority vested in me by law, and under the provisions of section 1 of an act of Congress entitled 'An act authorizing the appointment of receivers of national banks, and for other purposes,' approved June 30, 1876, do hereby appoint Benjamin U. Keyser receiver of the German-American National Bank of Washington, with all the powers, duties, and responsibilities given to or imposed upon a receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a receiver.

"In testimony whereof I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this first day of November, A. D. 1878.

"[SEAL.] (Signed) JOHN JAY KNOX,
"*Comptroller of Currency.*"

18 By Mr. ROBINSON:

Q. Have you in your possession the evidence of the transfer of the stock to Mrs. Hitz?

A. Yes, sir.

Mr. ROBINSON: I will first ask you what is that book (indicating).

A. This is a book labeled "Stock transfers and ledger, German-American Savings Bank." That is the label on book.

Q. I wish you would find there any evidence relating to the transfer of this stock.

A. On page 24, under date of January 21, 1876, I find the following entry:

"WASHINGTON, D. C., *January* 21, 1876.

"For value received, I hereby assign and transfer to Jane C. Hitz (corner of 6th and Penna. Ave. S. E.) all my right, title, and interest in 173 shares of the capital stock of the German-American Savings Bank of Washington, D. C., standing in my name on the books of said bank.

"JOHN HITZ.

"Witness:
"C. E. PRENTISS."

I find another certificate:

"WASHINGTON, D. C., *January* 21, 1876.

"For value received, I hereby assign and transfer to Jane C. Hitz (corner 6th and Penna. Ave. S. E.) all my right, title, and interest in ten shares of the capital stock of the German-American Savings Bank of Washington, D. C., standing in my name on the books of said bank.

"WILLIAM F. MATTINGLY,
"By SAMUEL L. MATTINGLY, *Att'y.*

"Witness:
"C. E. PRENTISS."

I find on the same day another certificate:

"WASHINGTON, D. C., *January* 21, 1876.

"For value received, I hereby assign and transfer to Jane C. Hitz (corner 6th and Penn. Ave. S. E.) all my right, title, and inter-
19 est in ten shares of the capital stock of the German-American Savings Bank of Washington, D. C., standing in my name on the books of said bank.

"R. B. DONALDSON.

"Witness:
"SAMUEL L. MATTINGLY."

I find another certificate:

"WASHINGTON, D. C., *January* 21, 1876.

"For value received, I hereby assign and transfer to Jane C. Hitz (corner 6th and Penn. Ave. S. E.) all my right, title, and interest in seven shares of the capital stock of the German-American Savings Bank of Washington, D. C., standing in my name on the books of said bank.

"C. E. PRENTISS."

By Mr. ROBINSON:

Q. Do you find anything there showing the surrender of old certificates—their cancellation—and the issue of new ones?

A. Yes, sir. I find, in reference to the first one I read, certificates Nos. 121, 122, 124, and 138 were surrendered and cancelled, and that new certificates, numbered 139, 140, 141, and 142 in part, were issued. In regard to the second certificate—that is, the transfer from Mr. Mattingly—I find that certificate 129 was surrendered and cancelled and certificate 142 in part was issued. With reference to the certificate of R. B. Donaldson, I find that certificate 74 in part was surrendered and cancelled and certificate 142 in part was issued. In reference to the certificate from C. E. Prentiss—that is, 128 and 130 in part—they were surrendered and cancelled and certificate 142 in part was issued.

Mr. ROBINSON: I now offer in evidence the application of the stockholders of the German-American Savings Bank for the conver-

sion of that bank into the German-American Bank. (To the witness:] Is this the original document?

A. That is the original document. I got it this morning from the office of the Comptroller of the Currency.

It is as follows:

"We, the undersigned stockholders of the German-American Savings Bank, located in the city of Washington, District of
20 Columbia, having a capital of one hundred and twenty-seven thousand one hundred dollars, do hereby authorize and empower the trustees thereof to change and convert said bank into a national banking association under the sections of the Revised Statutes which authorize the conversion of State banks into national associations, approved June 22, 1874, 'and of subsequent acts in addition to or amendatory thereof;' and we do also authorize the said trustees or a majority thereof to make and execute the articles of association and organization certificate required to be made or contemplated by said statutes; and also to make and execute all other papers and certificates, and to do all acts necessary to be done to convert said German-American Savings Bank into a national banking association, and to do and perform all such acts as may be necessary to transfer the assets of every description and character of said German-American Savings Bank to the national banking association into which it is to be converted; so that the said conversion may be absolute and complete; and we do hereby assume and authorize the said trustees to assume, as the name of the national banking association into which the said German American Savings Bank is to be converted, 'The German-American National Bank of Washington, D. C.;' and we do hereby appoint Robert B. Donaldson, Christian Heurich, John Hitz, James M. Lewis, William F. Mattingly, Charles E. Prentiss, and Christian Ruppert, who are now trustees of the said savings bank, to be the directors of the said national bank, to hold their offices as such directors until the regular annual election of directors is held, pursuant to the provisions of said Revised Statutes and until their successors are chosen and qualified; and we do hereby authorize the said directors of the said German-American National Bank to continue in office the officers of the said German-American Savings Bank or to appoint or elect others, as to them may seem best.

In witness whereof we have hereunto set our hands and written against our names the number of shares owned by us, respectively, this seventh day of May, A. D. 1877.

Names of stockholders.	No. of shares owned by each.
John Hitz	One hundred and thirty, 130
R. B. Donaldson	Ninety, 90
21 Wm. F. Mattingly	One hundred and ninety, 190
C. E. Prentiss	Sixty-one, 61
Rud. Oldberg	Fifteen, 15
John Hitz, trustee	Twenty-five, 25
Jane C. Hitz	Two hundred, 200

Wm. C. O'Meara	Ten,	10
C. Christiani	Ten,	10
John H. Ontrich	Ten,	10
L. H. Schneider	One hundred,	100
C. E. Prentiss, trustee	Twenty-nine,	29
Horace Hatch	Twenty,	20
J. T. Power	Twenty-five,	25
Adolf Cluss	Forty,	40
C. H. Liebermann	Ten,	10
J. M. Lewis	Seventy-five,	75
Annie W. Halstead	Thirty,	30
Geo. F. Schafer	Twenty,	20
W. G. Metzerott	Twenty,	20
Chr. Ruppert	Forty,	40
Chas. Schnebel	Five,	5
Matt. Alig	Five,	5
Charles Walter	Thirteen,	13
Charles Walter, in trust for C. A. W.	Two,	2
Susan Walker	Two,	2
Susan Walker, in trust for E. A. Kaiser	Two,	2
Chr. Heurich	Twenty,	20
Louis Leclerc	Two,	2
Alva L. Morris	Three,	3
John Hitz, C. E. Prentiss, trustees	Eighty-one,	81"

Q. (Handing witness a paper.) I wish you to look at that paper and tell me what it is.

A. (After examining paper.) This is a paper entitled "Articles of association."

The paper was then read in evidence as follows:

"We, the undersigned trustees of the German-American Savings Bank of the District of Columbia, having been authorized by the owners of two-thirds of the capital stock of said bank to change and convert the said bank into a national banking association, under section 5154 of the Revised Statutes of the United States, approved June 22, 1874, and of subsequent acts in addition to or amend-
22 atory thereof, and to execute articles of association, do hereby, in our own behalf and in behalf of the stockholders whom we represent, make and execute the following articles of association:

First. The name and title of the association into which the said German-American Savings Bank is to be changed and converted shall be the German-American National Bank of Washington, D. C

Second. The place where its banking-house or office shall be located and its operations of discount and deposit carried on and its general business conducted shall be the city of Washington, in the District of Columbia.

Third. The board of directors shall consist of five or more stockholders.

Fourth. The regular annual election of directors shall be held on

he second day of January of each year; but if no election shall be held on that day it may be held on any other day, according to the provisions of the tenth section of the act; and all elections shall be held according to such regulations as may be prescribed by the board of directors of the association, not inconsistent with the provisions of the aforesaid act.

Fifth. The capital stock of this association shall be one hundred and thirty thousand dollars, to be divided into shares of one hundred dollars each; but the capital may be increased, according to the provisions of section 5142 of the Revised Statutes, to any sum not exceeding four hundred thousand dollars; and in case of the increase of the capital of the association each stockholder shall have the privilege of subscribing for such number of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock is increased.

Sixth. The board of directors (a majority of whom shall be a quorum to do business) shall elect one of their members to be president of this association, who shall hold his office (unless he shall become disqualified or be sooner removed by a two-thirds vote of all the members of the board), for the term for which he was elected a director; and they shall have power to elect a vice-president, who shall also be a member of the board of directors, and to
23 elect or appoint a cashier and such other officers and clerks as may be required to transact the business of the association; to fix the salaries to be paid to them, and continue them in office or to dismiss them as, in the opinion of a majority of the board, the interests of the association may demand.

"They shall also have power to define the duties of the officers and clerks of the association, to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held, and to appoint judges of the elections; to provide for an increase of the capital of association, and to regulate the manner in which such increase shall be made, and, generally, to do and perform all the acts that may be legal for a board of directors to do under the statute aforesaid; and they shall also have the power to make all by-laws that it may be proper and convenient for them to make under said statute for the general regulation of the business of the association and the entire management and administration of its affairs, which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder who may be liable to this association, either as principal, debtor, or otherwise, without the consent of the board.

"Seventh. This association shall continue for the period of twenty years from the date of the organization certificate, unless sooner dissolved by the act of its stockholders owning at least two-thirds of its stock, who may dissolve and close up the association in such manner as they may deem to be for the interest of the stockholders and creditors of the association, but subject to the restrictions, requirements, and provisions of the act.

"Eighth. These articles of association may be changed or amended at any time by stockholders owning a majority of the stock of the association in any manner not inconsistent with the provisions of the Revised Statutes, and the board of directors or any three stockholders may call a meeting of the stockholders for this purpose.

"In witness whereof we, the trustees aforesaid, for ourselves
24 as such trustees and in behalf of the stockholders of the German-American Savings Bank aforesaid, have hereunto set our hands this seventh day of May, 1877.

"Signatures—

"JOHN HITZ.
"R. B. DONALDSON.
"C. E. PRENTISS.
"CHR. HEURICH.
"J. M. LEWIS.
"WM. F. MATTINGLY.
"CHR. RUPPERT."

"I certify that the articles of association of the German-American National Bank of Washington were executed in duplicate, and that one of the instruments so executed is the foregoing, and that the other, in all respects like the foregoing, is on file with said bank.

"May 7, 1877.

"C. E. PRENTISS, *Cashier.*"

"I certify the foregoing to be a true copy of the original articles of the association of the German-American National Bank of Washington, D. C.

"May 7, 1877.

"JOHN HITZ, *President.*"

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *May 14th*, 1877.

Whereas, by satisfactory evidence presented to the undersigned, it has been made to appear that the German-American National Bank of Washington, in the city of Washington, in the District of Columbia, has complied with all the provisions of the Revised Statutes of the United States required to be complied with before an association shall be authorized to commence the business of banking—

Now, therefore, I, John S. Langworthy, acting Comptroller of the Currency, do hereby certify that "The German-American National Bank of Washington, in the city of Washington, in the District of Columbia, is authorized to commence the business of banking as provided in section fifty-one hundred and sixty-nine of the Revised Statutes of the United States.

In testimony whereof witness my hand and seal of office this 14th day of May, 1877.

[L. S.]

J. S. LANGWORTHY,
Acting Comptroller of the Currency.

No. 2358.

25 Mr. ROBINSON: Now I offer in evidence this certificate from the office of the Comptroller of the Currency. (To the witness:) Examine that paper and tell me what it is (handing witness a paper).

A. This is a certified copy of the organization certificate, giving a list of the stockholders.

Mr. ROBINSON: This organization certificate is as follows:

"We, the undersigned trustees of the German-American Savings Bank of the District of Columbia, having been duly authorized by the owners of two-thirds of the capital stock of said bank to change said bank into an association and to make the necessary certificate under the sections of the Revised Statutes which authorized the conversion of State banks into national associations, approved June 22, 1874, and of subsequent acts in addition to or amendatory thereof, do sign and execute the following organization certificate, which we hereby declare we are authorized to make by the owners of two-thirds of the capital stock of said German-American Savings Bank:

"First. The name and title of this association shall be the German-American National Bank of Washington, D. C.

"Second. The said association shall be located and continued in the city of Washington and District of Columbia, where its operations of discount and deposit are to be carried on.

"Third. The capital stock of this association shall be one hundred and thirty thousand dollars ($130,000), and the same shall be divided into thirteen hundred shares of one hundred dollars each, as is now divided in the said German-American Savings Bank.

"Fourth. The name and residence of each of the stockholders of the said German-American Savings Bank, which is to become a national bank under the provisions of the Revised Statutes aforesaid, and the number of shares, of $100 each, held by each stockholder, are as follows:

Name.	Residence.	No. of shares.
R. B. Donaldson	Washington, D. C.	90
Christian Ruppert	"	40
Wm. F. Mattingly	"	190
Geo. F. Shafer	"	20
John Hitz	"	130
C. E. Prentiss	"	61
L. H. Schneider	"	100
Charles Walter	"	13
Horace Hatch	"	20
Chas. H. Lieberman	"	10
James M. Lewis	Gunstin, Fairfax Co., Va.	75
John Hitz, trustee	Washington, D. C.	25
W. G. Metzerott	"	20
Chas. Walter, in trust C. A. Walter	"	2
W. C. O'Meara	"	10
Edward Droop	"	10
Rudolph Oldberg	"	15
Susan Walker	"	2
Adolph Cluss	"	40
A. L. Morris	"	3
Geo. M. Kober	Camp McDamit, Nevada	5
26 Louis Leclerc	Washington, D. C.	2
Chr. Heurich	"	20
C. Christian	"	10
Susan Walker, in trust for E. A. Kaiser	"	2
Mathias Alig	"	5
Chas. Schnebel	"	5
John H. Ontrich	"	10
Jane C. Hitz	"	200
J. T. Power	"	25
Annie W. Halstead	"	30
John Hitz and C. E. Prentiss, trustees	"	81
C. E. Prentiss, trustee	"	29

"Fifth. This certificate is made in order that the said German-American Savings Bank and the stockholders thereof, may avail themselves of the advantages of the aforesaid Revised Statutes and that the said German-American Savings Bank may be changed and converted into a national banking association under the name and title of the German-American National Bank of Washington, D. C.

"In witness whereof we have hereunto set our hands this seventh day of May, 1877.

"JOHN HITZ.
"R. B. DONALDSON.
"C. E. PRENTISS.
"CHR. HEURICH.
"J. M. LEWIS.
"WM. F. MATTINGLY.
"CHR. RUPERT."

"DISTRICT OF COLUMBIA, *ss:*

"On this the seventh day of May, A. D. 1877, personally came before me, a notary public of said District, John Hitz, R. B. Donaldson, C. E. Prentiss, Chr. Heurich, J. M. Lewis, Wm. F. Mattingly, and Chr. Ruppert, trustees of the German-American Savings Bank, to me well known, who severally acknowledge that they executed the foregoing certificate for the purposes therein mentioned.

"Witness my hand and seal of office the day and year aforesaid.

"[SEAL OF NOTARY.] SAM'L L. MATTINGLY,
"*Notary Public.*"

27 "TREASURY DEPARTMENT, }
"*Office of Comptroller of the Currency,* } *ss:*

"I certify the foregoing to be a true and complete copy of the original organization certificate of the German-American National Bank of Washington, with the acknowledgments thereof, now on file and of record in this office, and of the whole of such originals, and that such originals were so filed and recorded on the 13th day of May, A. D. 1877.

"In testimony whereof I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this 29th day of May, A. D. 1877.

"[SEAL.] JNO. JAY KNOX,
"*Comptroller of the Currency.*"

Mr. ROBINSON (to the witness): Have you the stubs referring to the transfer of that stock?

A. I have them.

Q. Read them.

A. "No. 139, 50 shares, issued to Jane C. Hitz in lieu of certificates numbered 121, 122, 124, and 138.

"JANUARY 21, 1876.

"Washington, D. C., No. 140, 50 shares, issued to Jane C. Hitz in lieu of certificate No. 129.

"No. 141, 50 shares, issued to Jane C. Hitz in lieu of certificate No. 74, in part, Washington, D. C., January 21, 1876.

"No. 142, 50 shares, issued to Jane C. Hitz in lieu of certificates numbered 128 and 130, in part, Washington, D. C., Jan. 21, 1876."

Mr. ROBINSON: I now offer in evidence checks for the dividends upon the stock held by Mrs. Hitz. They are as follows——

Mr. TOTTEN: I object to the introduction of these checks, your honor.

The COURT: I make the same ruling.

Mr. TOTTEN: And I desire an exception.

Mr. ROBINSON (reading):

28 "GERMAN-AMERICAN SAVINGS BANK,
"WASHINGTON, D. C., *May* 1, 1876.

"Pay to Jane C. Hitz or order $800, fourth dividend, payable this day on stock standing in her name on the books of this bank, and charge to dividend account No. 3300.

"$800. C. E. PRENTISS, *Cashier.*"

That check is endorsed: "Pay to order of John Hitz. Jane C. Hitz."

Then follows: "John Hitz, consul general."

The next check is in exactly the same terms.

"Pay to Jane C. Hitz or order $800, fifth dividend, payable this day on stock standing in her name on the books of this bank, and charge to dividend account No. 3300.

"$800. C. E. PRENTISS, *Cashier.*"

That is endorsed, "Jane C. Hitz," in blank, so far as I can see.

And then underneath that is, "John Hitz, consul general."

The next check is in exactly the same terms.

"Pay to Jane C. Hitz or order $800, sixth dividend, payable this day on stock standing in her name on the books of this bank and charge to dividend account No. 3300.

"$800. C. E. PRENTISS, *Cashier.*"

That is endorsed in blank: "Jane C. Hitz." Then underneath is, "John Hitz, consul general," showing that he deposited these checks to his consul-general account. Then there is a stamp to show that they were paid; one is dated May 1, 1876, another Nov. 1, 1876, and the other May 1, 1877.

By Mr. ROBINSON:

Q. Did you furnish the Comptroller of the Currency the information upon which he based the assessment upon the stockholders?

29 Mr. TOTTEN: I object to that question.

The COURT: I think he may state what he furnished.

Mr. TOTTEN: If he furnished him anything.

Mr. ROBINSON: I will put the question interrogatively. (To the witness:) What did you furnish the Comptroller of the Currency?

A. I furnished him a statement of the assets and liabilities of the bank.

Q. From what source did you obtain that list of the stockholders?

A. From the records of the bank.

Q. Have you a copy of the list furnished?

A. I have not.
Q. Can you get it before the case is ended?
A. Yes, sir.
Mr. ROBINSON (to the witness): What books did the German-American Bank use?
A. The two banks used, in reference to the transfer of stock, the same identical book.
Q. And the business of the national bank was continued along in the same book of the savings bank?

Mr. TOTTEN: Before he states that fact I want him to confine himself to the record. He had nothing to do with this bank until it failed, except that he was a bank examiner.
The COURT: Does he not speak of what the books show?
The WITNESS: I think I do.
The COURT: The witness will state just precisely what the fact is, I presume.
The WITNESS: The fact is, as I have stated, the entries were continued along.
Mr. TOTTEN: The title of the book is the same?
The WITNESS: I find the entries of October 30, 1878, October 5, July 23, June, 6 all national bank.

30 The COURT: There was no new record made of shareholders?
Mr. ROBINSON: No, sir.

By Mr. TOTTEN:

Q. And the printed forms of transfers used by the savings bank continued to be used, as appears there, down to the end?
A. Yes, sir; I find this written on some of the certificates: "September 21, 1878, issued in same name under national bank organization."
Q. That is in lead pencil?
A. No, sir; that is in ink; I do not know whether that is the only one—no, here are others—123, 124—a half dozen others.

By Mr. ROBINSON:

Q. That, then, is the book of the German-American National Bank, as well as the book of the German-American Savings Bank?

Mr. TOTTEN: I object to that. Mr. Keyser is a good banker, but he does not know enough of law to give us an opinion upon that point.
The COURT: That is the fact about it. It is so stated on record.
Mr. ROBINSON: That is the fact. (To the witness:) What was your office before you were receiver of the German-American National Bank?
A. I was an examiner of national banks.
Q. And as such had you examined this bank?
A. I had.
Q. And as such examiner had you furnished a list of the stockholders to the Comptroller of the Currency?

The WITNESS: I did.

Q. Have you that list?

A. No, sir.

31 Q. Will you get one of those lists from the Comptroller of the Currency?

A. Yes, sir.

Cross-examination by Mr. TOTTEN:

Q. All the information you have touching these records is what you have obtained from the records themselves?

A. That is all.

Q. You have stated that there is no other book called a transfer of stock book than the one you have before you?

A. I have so stated.

Q. Being the book marked as of the German-American Savings Bank?

A. That is true. Let me answer that I have a further stock book. This is a transfer book. I have a further stock book.

Q. You read to the jury a short time ago a form of transfer of stock signed by John Hitz, one by Prentiss, one by Mattingly, and one by Donaldson. Are those certificates of transfer which you find in the book before you made subsequently to the transformation of the savings bank into a national bank and upon a printed form of transfer?

A. I do not quite understand you.

Q. Were the same forms of transfer used after the change as were used before the change?

A. They seem to be the same.

Q. The same printed form? That book before you is a book of printed forms.

A. Yes, sir; but the stock which was issued in the later days of the bank was issued in the name of the national bank.

Q. It was?

A. Yes, sir.

Q. Have you any of that before you?

32 A. I have not; it is the book following the certificate book.

Q. The certificate, or the book containing the blank certificates for the savings bank, you have before you?

A. I have.

Q. And that contains the stubs of these old certificates which were cancelled and the stubs purporting to be new certificates issued to Mrs. Hitz?

A. Yes, sir.

Q. Is there any evidence to show that they were delivered to Mrs. Hitz?

A. None but the stub.

Q. None but the stub itself?

A. That is all.

Q. And where is this new form of certificate which you say was used?

A. At my office.

Q. Did you look there to see whether there was any stock issued to Mrs. Hitz in the national bank?

A. I have.

Q. And you found none?

A. I found none.

Q. Then there is no evidence that there was any stock issued to her in the national bank?

A. That is true.

Q. The bank failed on the 30th day of October, 1878?

A. Yes, sir.

Q. And you have been in custody since that time?

The COURT: Is there any objection to inquiring whether there were any new certificates issued to anybody?

A. Mr. TOTTEN: Mr. Keyser has just stated that there was.

Mr. ROBINSON: It was not the custom of the bank.

By Mr. TOTTEN:

33 Q. You stated that there were certificates issued in the national bank in place of the German-American Savings Bank?

A. There were in some cases.

Q. Towards the last?

A. Yes, sir.

Q. Those forms of certificates are in the book which you have at your office, but not here?

A. Yes, sir.

Q. You looked at those three checks which had been used, and you know them very well, as I know?

A. Yes, sir, I have seen them often.

Q. They appear to have gone to the credit of John Hitz as what?

A. Consul general.

Q. Do you know, as a matter of fact, that he had an account of that character under that designation in the German-American Savings Bank?

A. He had.

Q. Those checks are paid and are punched to indicate that they are destroyed?

A. They passed to his credit on that account.

Q. When did you take possession of these books and papers?

A. I took possession of them on the 30th or 31st day of October, 1878.

Q. The bank failed on the 30th of October, 1878—that is, it closed its doors on that day, never to open them again?

A. Yes, sir.

Q. And you have been settling up its affairs ever since?

A. I have.

34 Redirect examination by Mr. ROBINSON:

Q. I will ask you one question. Was it the custom of the German-American National Bank to issue new certificates of stock to

the stockholders who already had certificates in the German-American Savings Bank?

Mr. TOTTEN: Of course you mean to ask him what he has learned from the books?

Mr. ROBINSON: From the books of the bank.

The WITNESS: I suppose they did in some cases where they were specially desired by stockholders.

Mr. TOTTEN: He has explained that towards the end of the existence of the bank that was done.

By Mr. ROBINSON:

Q. Was it the rule of the bank to issue certificates in such cases?

A. I cannot answer that.

Q. Can you answer in what proportion the instances of new certificates bore to those in which no certificates were issued—bore to the whole amount of stock?

A. I suppose about half.

Q. And they were issued when they were specially desired?

Mr. TOTTEN: Wait a minute.

Mr. ROBINSON: He has just stated that.

Mr. TOTTEN: He guessed at it. (To the witness:) Do you know that?

A. I suppose that was the case.

Mr. ROBINSON: We will get Mr. Keyser to bring in that list.

The COURT: The original list of the German-American Savings Bank?

Mr. ROBINSON: Yes, sir.

By Mr. TOTTEN:

35 Q. (Exhibiting to witness a paper.) I will ask you if that was not one of the certificates issued for the convenience of everybody, stub and all.

A. It is the same form that was used in that book (indicating).

By Mr. ROBINSON:

H. C.

Q. You notified Mrs. Hitz of this assessment upon her?

A. I did.

Q. And requested payment on her shares of stock?

A. Yes, sir.

Q. And the payments have not been made?

A. The payments have not been made.

The COURT: What next, Mr. Robinson?

Mr. ROBINSON: I believe that finishes my testimony-in-chief.

The COURT: With the right of producing that list?

Mr. ROBINSON: Yes, sir.

To the reading in evidence to the jury of each and every of the foregoing transfers, books, certificates, papers, paper writings, and documents the counsel for the defendant objected at the time when each of them was offered in evidence and before the reading thereof,

respectively, to the jury, but said objections were severally and at the time they were each made overruled by the court, and, notwithstanding said objection and objections, said papers, paper writings, and documents, &c., were by plaintiff's counsel successively read in evidence to the jury; to which several opinions, rulings, and reading in evidence the counsel for the defendant duly excepted, and the exceptions were at the time of the taking thereof severally and duly noted by the court.

The plaintiff here rested his case.

And thereupon, to maintain the issue on defendant's behalf joined, there was offered in evidence:

36 "*Certificate of Incorporation of the German-American Savings Bank.*

"Know all men by these presents:

"Whereas we whose names are hereunto subscribed are desirous of forming a savings bank in the District of Columbia;

"And whereas by the second section of an act of Congress approved June 17th, 1870, and entitled 'An act exempting from taxes certain property in the District of Columbia and to amend the act to provide for the creation of corporations in the District of Columbia by general law,' it was, among other things, enacted that savings banks may be organized within the District of Columbia under section four of 'An act to provide for the creation of corporations in the District of Columbia by general law:'

"Now, therefore, know all men by these presents that we, the subscribers, under and by virtue of the provisions of the aforesaid act of June 17th, 1870, and the act therein referred to of May 5th, 1870, do hereby associate ourselves and do declare and certify, as by said acts required, that—

"1st. The name of the corporation to be formed by us shall be the 'German-American Savings Bank.'

"2d. The object of the corporation to be formed by us is to receive on deposit, safely invest, and secure interest upon money deposited with it on such terms and conditions as may be fixed by the by-laws, it being distinctly understood, however, that a sum equal to one-fourth of the aggregate sum of deposits is at all times to be invested in United States or other securities which can be realized on at any time, and that the loans upon real estate security shall never exceed in the aggregate three-fourths of the funds of the bank; and, further, to transact such banking business as is usual and customary with savings banks.

"The capital stock of this bank shall consist of fifty thousand dollars, divided into five hundred shares of the par value of one hundred dollars each.

37 "4th. The term of this corporation shall be twenty years.

"5th. There shall be nine trustees, who shall manage the affairs of this bank for the first year, namely: R. B. Donaldson, Anton Eberly, Henry Franc, John Hitz, William F. Mattingly, Alfred Schucking, Christian Ruppert, Louis H. Schneider, Frederick Stutz.

"6th. The business operations of this corporation are to be carried on in the city of Washington.

"In testimony whereof we have hereunto set our hands and affixed our seals, at Washington, District of Columbia, this twenty-third day of September, A. D. 1872.

"Signed,	JOHN HITZ.	[L. S.]
	"ANTON EBERLY.	[L. S.]
	"HENRY FRANC.	[L. S.]
	"WILLIAM F. MATTINGLY.	[L. S.]
	"JOHN L. VOGT.	[L. S.]
	"GEORGE EMMERT.	[L. S.]
	"C. E. PRENTISS.	[L. S.]
	"R. B. DONALDSON.	[L. S.]
	"ALFRED SCHUCKING.	[L. S.]
	"CHRISTIAN RUPPERT,	[L. S.]
	"LOUIS H. SCHNEIDER.	[L. S.]
	"FREDERICK STUTZ.	[L. S.]
	"CHARLES WALTER.	[L. S.]

"DISTRICT OF COLUMBIA, } ss:
"*Washington City,* }

"Before me, Edmund F. Brown, a notary public in and for the District aforesaid, this twenty-third day of September, A. D. 1872, personally appeared John Hitz, Anton Eberly, Henry Franc, Wm. F. Mattingly, John L. Vogt, George Emmert, C. E. Prentiss, R. B. Donaldson, Alfred Schucking, Christian Ruppert, Louis H. Schneider, Frederick Stutz, and Charles Walter, to me well known and whose names and seals are subscribed and affixed to the certificate of incorporation hereto attached, and in my presence signed
38 and sealed the same and acknowledged the same to be their free act and deed for the purposes therein mentioned.

"Witness my hand and seal notarial at Washington city, District of Columbia, this twenty-third day of September, A. D. 1872.

[NOTARIAL SEAL.] (Signed) EDMUND F. BROWN,
Notary Public.

"(Endorsement:) Received for record September 24, 1872, and recorded in Liber of Deeds of Incorporation, D. C., folio 236, and examined by— (Signed) S. Wolf, recorder of deeds."

Testimony on Behalf of Defendant.

And further to maintain the issue on defendant's behalf the following witnesses were sworn and examined:

WILLIAM F. MATTINGLY was sworn and examined:

By Mr. TOTTEN:

Q. In the testimony in this case we have had a transfer of stock apparently standing in your name. Here is a certificate of ten shares of stock in the German-American Savings Bank, which stock seems to have been transferred on the 21st of January, 1876, by you,

through your attorney, Samuel F. Mattingly, to Jane C. Hitz. I want you to tell the jury what you know about it.

A. Mr. Keyser showed me this at the last trial of this case, but I have not the slightest recollection of it in the world. I did own some stock in the bank, unfortunately, but I never transferred it. I was not aware of the fact that I ever transferred any to Mrs. Hitz. I see that that transfer was made by my brother, and I suppose he knew all about it. I suppose that all he did was rightly done.

39 Q. Did you ever transfer any stock to Mrs. Hitz?

A. No, sir.

Q. Did you ever own any stock?

A. Yes, sir.

Q. Did she ever pay you for that stock?

A. No, sir.

Q. Did anybody else for her?

A. No, sir.

Q. Do you know who did own that stock?

A. Mr. Keyser showed me ten shares of stock that belonged to Mr. Franc. I have no recollection of having bought any stock from Mr. Franc.

Q. Do you know that you did not?

A. I am pretty well satisfied I did not.

Cross-examination by Mr. ROBINSON:

Q. Have you any idea how that stock came to be in your name?

A. I have not.

Q. I understood you to say that whatever was done by your brother was rightly done?

A. I presume he was aware how it came to be in my name, and also that it did not belong to me, and how it came to be transferred to my name. I see the original transfer from Mr. Franc was also done in his name.

By the COURT:

Q. By whom?

A. By my brother.

R. B. DONALDSON sworn and examined.

By Mr. TOTTEN:

Q. Here is a certificate of ten shares of stock, representing $1,000, in the German-American Savings Bank, which stock was

40 transferred to Mrs. Jane C. Hitz (exhibiting to witness certificate). I want you to state to the jury what you know about that—whether that was your stock, and, if you sold it to Mrs. Hitz, whether she paid you for it, and what it was?

A. I never sold any stock to Mrs. Hitz; never was paid for any stock by Mrs. Hitz, and had no recollection of that transaction whatever.

Q. Were you ever paid for that stock by Mrs. Hitz or by anybody for her?

A. No, sir.

Q. You never had any dealings with Mrs. Hitz about the stock of that bank?

A. No, sir.

Cross-examination by Mr. ROBINSON:

Q. It would not have been necessary for you to have seen Mrs. Hitz in order to transfer stock to her?

A. I presume not.

Q. I have no doubt your testimony as to your memory is correct.

A. Yes, sir.

Redirect examination by Mr. TOTTEN:

Q. Was that stock yours—those ten shares?

A. That was during the existence of the savings bank?

Q. Yes, sir.

A. No, sir.

Q. It was not yours?

A. I had a certain amount of stock in the savings bank and kept it until the savings bank was discontinued. I did not buy any additional stock, nor did I transfer my stock to any one—the original stock for which I subscribed.

Q. And that was all you ever owned?

A. That was all I ever owned.

41 Recross-examination by Mr. ROBINSON:

Q. Do you know the numbers of the certificates you owned?

A. No, sir; I have no recollection of the numbers of the certificates.

Q. I will ask you whose signature that is (indicating on the book).

A. I should judge that to be my signature. At the same time I have no recollection whatever in regard to the case.

WILLIAM F. MATTINGLY recalled.

By Mr. ROBINSON:

Q. Is this (indicating on the book) your signature?

A. No, sir; it was written by my brother. If his name was not underneath it I would suppose it to be my own; it looks so much like it.

B. U. KEYSER recalled.

By Mr. ROBINSON:

Q. What document is that (handing witness a paper)?

A. That is a list of the names and residences of shareholders of the German-American Savings Bank of Washington, D. C., on the 8th day of January, 1878. That list I got a few moments ago from the files of the Comptroller of the Currency.

Q. What document is that (handing witness another paper)?

A. That is a list which I got from the same place, and which I furnished to the Comptroller of the Currency at the date of the insolvency of that bank.

Mr. TOTTEN: Does your honor admit those documents?

The COURT: Yes, sir.

Mr. TOTTEN. Then I desire an exception.

42 (An exception was noted by the court at the time.)

The papers referred to are as follows, and were read in evidence notwithstanding the objection:

Copy of List of Names and Residences of Shareholders of the German-American National Bank of Washington, D.C., on the First Monday of July, 1878.

Names.	Residence.	No. of shares.	
Donaldson, R. B.	Washington, D. C.	90	$9,000
Ruppert, Christian	"	40	4,000
Mattingly, Wm. F	"	190	19,000
Schafer, Conrad	"	4	400
Hitz, John	"	130	13,000
Prentiss, C. E.	"	40	4,000
Schneider, Louis H.	"	100	10,000
Hatch, Horace	"	20	2,000
Leibermann, Chas. H.	"	10	1,000
Lewis, Jas. M.	Accotink, Va.	75	7,500
Hitz, John, trustee	Washington, D. C.	25	2,500
Metzroot, Wm. G.	"	20	2,000
O'Meara, W. C.	"	10	1,000
Droop, Edward	"	10	1,000
Oldberg, R.	"	15	1,500
John Hitz and C. E. Prentiss, trustees	"	28	2,800
Walker, Susan	"	2	200
Cluss, Adolph	"	50	5,000
Kober, Geo. M.	Camp McDermott, Nev.	5	500
LeClerc, Louis	Washington, D. C.	2	200
Heurich, Christian	"	20	2,000
Christiani, C.	"	10	1,000
Walker, Susan, trustee (for Emma A. Kaiser)	"	2	200
Aleig, Mathias	"	5	500
Schnebel, Chas.	"	5	500
Hitz, Mrs. Jane C.	"	200	20,000
Power, J. C.	"	25	2,500
Holstead, E. P.	"	136	13,600
Doubleday, F. G.	"	1	100
Johnson, E. L. C.	"	10	1,000
Total		1,300	$130,000

I, C. E. Prentiss, cashier of the German-American National Bank of Washington, D. C., being duly sworn, depose and say that the foregoing is a full and correct list of the stockholders of said bank, with the residence of each and the number of shares of the stock of said bank held by each of them on the first Monday of July,
43 1878, and that the same is a true copy of the list of stockholders on file in said bank on that day.

C. E. PRENTISS, *Cashier.*

DISTRICT OF COLUMBIA, *ss*:

Subscribed and sworn to before me this 16th day of July, 1878.

[SEAL.] S. F. AUSTIN,
Notary Public.

R. B. Donaldson	$4,000
Christian Ruppert	4,000
Wm. F. Mattingly	4,000
John Hitz	23,000
C. E. Prentiss	4,000
L. H. Schneider	10,000
Horace Hatch	2,000
Chas. H. Leibermann	1,000
Jas. M. Lewis	2,500
John Hitz, trustee	2,500
Wm. G. Metzerott	2,000
W. C. O'Meara	1,000
Edward Droop	1,000
Rudolph Oldberg	1,500
John Hitz, C. E. Prentiss, trustees	2,800
Susan Walker	200
Adolph Cluss	5,000
Geo. M. Kober	500
Louis LeClerc	200
C. Heurich	2,000
Susan Walker, in trust for Emil Kaiser	200
Mathias Alig	500
Chas. Schenbel	500
Jane C. Hitz	20,000
J. T. Power	2,500
Anna W. Hostead	3,000
Francis G. Doubleday	100
Conrad Schafer	400
E. B. Holstead	13,600
Eleanor Mattingly, in trust for A. S. Mattingly	15,000
Emil S. Frederick	1,000
Total	$130,000

44 By Mr. TOTTEN:

Q. Who were the officers of the German-American Savings Bank?
A. When?

Q. About the time the transfer was made.

A. Mr. John Hitz was the president: Mr. Donaldson was the vice-president; Charles E. Prentiss was the cashier, and the other trustees were Mr. Mattingly, Mr. Heurich, Mr. Ruppert, and Mr. Lewis. I cannot recall any other names.

Q. Who were the officers of the German-American National Bank, so called?

A. The same persons.

And further to maintain the issue joined on defendant's behalf JANE C. HITZ was sworn and examined.

By Mr. TOTTEN:

Q. What is your name?

A. Jane C. Hitz.

Q. Are you the defendant in this case?

A. I am.

Q. Are you a married woman?

A. I am.

Q. What is your husband's name?

A. John Hitz.

Q. Where do you reside?

A. At 315 N. J. avenue southeast.

Q. How long have you resided there?

A. For the last three years.

Q. Where does John Hitz live?

A. At the corner of 6th and Penn. avenue.

Q. How long have you lived separately from John Hitz?

A. About three years.

Q. Is he the same John Hitz who was the president of the German-American National Bank?

45 A. He is.

Q. I want to know from you whether you ever owned any stock in the German-American Savings Bank?

A. I never did.

Q. Did you ever buy any stock in the German-American Savings Bank?

A. I did not.

Q. Did you ever have any certificate in your hand for stock in that bank?

A. I never had.

Q. Did you ever have any stock in the German-American National Bank?

A. I had not.

Q. Did you ever have a certificate in your possession for such stock?

A. I never had.

Q. Did you ever pay anything for any stock in either of those concerns?

A. I did not.

Q. Did you ever vote on the stock?

A. I did not.

Q. Did you ever know that your name appeared among the stockholders on the books of either of those banks?

A. I did not until after the failure of the bank.

Q. The failure of the national bank?

A. Yes, sir; the national bank.

Q. That was on the 30th of October, 1878?

A. I think so.

Q. How was that brought to your attention?

A. I was informed by Charles E. Prentiss, cashier of the bank, on the day following the closing of the bank that I was the largest stockholder in that bank; that was the first information I had to that effect, and I so informed the cashier.

46 Q. Did you ever receive any money for dividends either declared or paid by the German-American Savings Bank or the national bank?

A. I never did.

Q. The stub book of certificates belonging to the bank seems to show that there were four certificates, or about that number, issued in your name. I want to know whether they were ever delivered to you.

A. They were never delivered to me.

Q. Did you ever see them?

A. I think that after the failure of the bank one or more of such certificates were shown to me.

Q. Where?

A. If I remember aright, at my house. They were never shown to me before the failure, and I never had possession of such certificates.

Q. Did you ever see such certificates before that time?

A. Never.

Q. I show you a photographic copy of a paper that was introduced in evidence this morning, and which appears to bear your name. You saw the original of that this morning, did you not (handing witness paper)?

A. Not this morning.

Q. But you have seen it?

A. Yes, sir.

Q. Will you state to the jury whether that (indicating) is your signature or not and whatever you may know about that paper?

A. I do not know anything about the paper. The signature resembles mine.

Q. Do you remember having written your name to such a paper?

A. No, sir.

Q. Did anybody ever ask you to sign such a paper, or ask your consent for the transfer from the savings bank to the national bank; and, if so, who?

47 A. I was never asked to give such consent. I was not aware of the transfer until it happened.

Q. Until what. Until it was accomplished?

A. Yes, sir; I was ignorant of it.

Q. Do you remember ever seeing a paper like that? I refer to the original of which that is a photographic copy.

A. I never saw such a paper until after the failure of the bank.

Q. Do you say that is your signature?

A. I say it resembles my signature. I have no recollection of seeing such a paper.

Q. If such a paper as that were presented to you would you have signed it?

A. I would not if I understood what it was. I could have no reason for signing it. I never owned any stock there, certainly never intended to own any stock there.

Q. Why?

A. I did not want it.

Q. Why did you not want it?

A. I should have preferred to invest any money of mine elsewhere.

Q. There have been three checks shown here. You have seen them before, I fancy. I want you to look at them and tell the jury whether you know anything about them. One is dated May 1, 1876, one November 1, 1876, and the other May 1, 1877. One is on the German National Bank, signed, apparently, Jane C. Hitz and John Hitz, consul general. What do you say about that? I will show you the other at the same time. This is signed Jane C. Hitz, John Hitz, *counsel* general. This one is the same, and appears to have your name and your husband's name under it. State to the jury whether you know anything about those checks, and, if so, what. What are the facts about them, so far as you know (handing to witness the three checks heretofore introduced in evidence?)

48 A. (After examining.) I know nothing about those checks further than they were shown me after the failure of the German-American National Bank, and during the progress of some legal proceedings in which I was interested and took part. It was then that I saw those checks bearing a signature which resembles mine. I have no recollection of having seen those checks previously to that occasion.

Q. What do you say as to the signature—did you write it?

A. I cannot say.

Q. Did you ever get any money on account of those checks?

A. I never did.

Q. Did you know anything about them except what you found out after the failure of the bank?

A. I did not.

Q. Do you remember any conversation about them with anybody before the failure of the bank?

A. None whatever.

Q. Those checks appear to have been paid. Do you remember whether you ever had them in your possession or not?

A. No, sir; I never had them in my possession.

Q. What do you say?

A. I am certain I never had them in my possession.

Q. Can you account to the jury for the similarity of that signature to your own?

A. I cannot.

Q. Do you say you never wrote your name on the back of those checks?

A. No, sir; I cannot say that. I have no recollection of having done so. I never did so knowing the nature of the checks; never did so at all, so far as I can recollect.

49 Cross-examination by Mr. ROBINSON:

Q. You are unable to deny that that is your signature?

A. I cannot positively deny that it is.

Q. Can you deny at all that that is your signature?

A. I can deny having any recollection of having signed them.

Q. Can you deny that it is your signature?

A. I cannot deny it.

Q. Now, I will ask you whether, when you were in Europe, the salary of your husband as consul general was not paid to you?

A. It was during part of the time that I was there.

Q. To what did that salary amount?

A. I think $3,000.

Q. I will ask you whether there are not a good many papers and deeds which you have signed, the signatures to which you have forgotten. I will remind you of one. Did you not make a deed to Samuel L. Mattingly before Mr. Upton, the consul, which deed you forgot you had made?

A. I think so.

Q. Did you not make a deed on Capitol Hill, in 1875, which you could not remember, which you had forgotten, and which you afterwards, your memory being refreshed, did remember?

A. I thought I had not made that deed.

Q. Now, I will ask you whether your husband was not in charge of all your personal property?

A. He had the management of my personal property.

Redirect examination by Mr. TOTTEN:

Q. Would it have been possible for you to have owned $20,000 worth of stock ine th German-American Savings Bank and not have remembered it?

Mr. ROBINSON: I object to that question.

The COURT: You can take the answer

50 Mr. ROBINSON: I desire to reserve an *inspection.*

By Mr. TOTTEN:

Q. What is the answer?

A. I think it would have been impossible.

Q. Assuming that you did indorse those checks, if the nature of the checks had been explained to you by anybody, could you have forgotten them?

Mr. ROBINSON: I object to that.

The COURT: You can take the answer.
Mr. ROBINSON: I desire an exception.

The WITNESS: I certainly would not have forgotten the nature of the checks.

By Mr. TOTTEN:

Q. Were you consulted about the organization of this savings bank?
A. I was not.
Q. Were you aware of it?
A. I was not.

Mr. ROBINSON: I asked no questions about the savings bank.
Mr. TOTTEN: But I did.
Mr. ROBINSON: You have had your examination-in-chief.

By Mr. TOTTEN:

Q. If you had seen those checks could you have forgotten them?
A. Had I seen them, knowing what they were, I should not have forgotten them—could not have forgotten them.
Q. I asked you if you were consulted as to the proposed organization of the bank?
The COURT: You have an answer to that question.
Mr. TOTTEN: If I have, that is all I desire to ask Mrs. Hitz.

To the leave granted to put the question and take the answers in the above redirect examination of the defendant and to the
51 admission of the same in evidence the plaintiff objected, but the court overruled the objection and admitted the evidence; to which opinion of the court overruling said objection and admitting said answers the plaintiff, by his counsel, then and there and before the jury retired excepted and tendered this bill of exception, which is received, signed, and sealed by the court and ordered to be made a part of the record in this cause this 5th day of December, 1883, *nunc pro tunc*.

ARTHUR MACARTHUR, *Justice*. [SEAL.]

Second Bill of Exception.

And, further, at the trial of this cause, after the opinion of the court and the evidence set forth in the first bill of exception (which is hereby made a part of this bill of exception and was the whole evidence in the case), the defendant, by her counsel, moved the court to grant the following prayer:

"If the jury shall be satisfied from the evidence that the stock involved in this controversy was transferred upon the books of the German-American Savings Bank to and in the name of the defendant without her knowledge and consent, the verdict shall be for the defendant, unless they shall further find that she subsequently and knowingly ratified and confirmed such transfer."

To the granting of this prayer the plaintiff, by his counsel, objected but, notwithstanding the fact that there was no other evi-

dence, save that which by reference has been made part of this exception, the court overruled the objection and granted the prayer; to which opinion of the court overruling said objection and granting said prayer the plaintiff, by his counsel, then and there and before the jury retired excepted and tendered this bill of exception, which is received, signed, and sealed by the court and ordered to be made a part of the record in this case this 5th day of December, 1883, *nunc pro tunc.*

ARTHUR McARTHUR, *Justice.* [SEAL.]

52 *Third Bill of Exception.*

And, further, after the evidence set forth in the first bill of exception (which is made part of this bill of exception and which was the whole evidence in the case), and after the opinions of the court in the first and second bills of exceptions, the defendant, by her counsel, moved the court to grant the following prayer:

"If the jury shall be satisfied from the evidence that the defendant was procured to sign the application to the Comptroller of the Currency asking for the establishment of the German-American National Bank by fraudulent means and representations, the said paper shall not be taken as a consent to or ratification of such change or a confirmation of the transfer to her of such stock on the books of the said savings bank."

To the granting of this prayer the plaintiff, by his counsel, objected; but, notwithstanding the fact that there was no other evidence in the case save that which by reference is made part of this exception, the court overruled the objection and granted the prayer; to which opinion of the court overruling said motion and granting said prayer the plaintiff, by his counsel, then and there and before the jury retired excepted and tendered this bill of exception, which is received, signed, and sealed by the court and ordered to be made a part of the record in this cause this 5th day of December, 1883, *nunc pro tunc.*

MACARTHUR, *Justice.* [SEAL.]

Fourth Bill of Exception.

And, further, after the opinions of the court in the first, second, and third bills of exceptions, and after the evidence set forth in the first bill of exceptions (which is made part of this bill of exception and was the whole evidence in the case), the defendant, by her counsel, moved the court to grant the following prayer:

53 "If the jury shall find from the evidence that the defendant was induced to endorse the three dividend checks offered in evidence, which were drawn upon the German-American Savings Bank for dividends of that institution, by means of fraud or misrepresentation, or by concealing from defendant the facts concerning them, such checks shall not be regarded as a confirmation of the transfer of stock, nor as evidence against her."

To the granting of this prayer the plaintiff, by his counsel, ob-

jected; but, notwithstanding the fact that there was no other evidence in the case save that which by reference is made part of this exception, the court overruled the objection and granted the prayer; to which opinion of the court overruling said objection and granting said prayer the plaintiff, by his counsel, then and there and before the jury retired excepted and tendered this bill of exception, which is received, signed, and sealed by the court and ordered to be made a part of the record in this cause this 5th day of December, 1883, *nunc pro tunc*.

MACARTHUR, *Justice*. [SEAL.]

Fifth Bill of Exception.

And, further, after the opinions of the court mentioned in the first, second, third, and fourth bills of exceptions, and after the evidence set forth in the first bill of exception (which is made part of this bill of exception and was the whole evidence in the case), the defendant, by her counsel, moved the court to grant the following prayer:

"If the jury shall find from the evidence that the said stock was transferred to the defendant for fraudulent purposes, by or at the instigation of her husband, and without her knowledge or consent, such transfer was void, and the defendant is entitled to the verdict."

To the granting of this prayer the plaintiff, by his counsel,
54 objected; but, notwithstanding the fact that there was no other evidence in the case save that which by reference is made part of this exception, the court overruled the objection and granted the prayer; to which opinion of the court overruling said objection and granting said prayer the plaintiff, by his counsel, then and there and before the jury retired excepted and tendered this bill of exception, which is received, signed, sealed, and ordered to be made a part of the record in this cause this 5th day of December, 1883, *nunc pro tunc*.

MACARTHUR, *Justice*. [SEAL.]

Sixth Bill of Exception.

And, further, after the opinions of the court mentioned in the first, second, third, fourth, and fifth bills of exceptions, and after the evidence set forth in the first bill of exception, which is made part of this bill of exception and was the whole evidence in the case, the defendant, by her counsel, moved the court to grant the following prayer:

"If at the time the stock was transferred to her on the books of the company or at any time prior thereto she had not purchased the stock or authorized it to be purchased, either directly or indirectly, and knew nothing about it, she was not responsible as a shareholder to contribute upon an assessment of this kind."

To the granting of this prayer the plaintiff, by his counsel, objected; but, notwithstanding the fact that there was no other evidence in the case save that which by reference is made part of this exception, the court overruled the objection; to which opinion of the court overruling said objection and granting said prayer the plaintiff, by

his counsel, then and there and before the jury retired excepted, and tendered this bill of exception, which is received,
55 signed, sealed, and ordered to be made a part of the record in this cause this 5th day of December, 1883, *nunc pro tunc*.

MACARTHUR, *Justice*. [SEAL.]

(It being insisted by the defendant's counsel that the prayers allowed the plaintiff should be included herein, the same are now enumerated to prevent disagreement.)

Upon the request and motion of the counsel for the plaintiff the court thereupon granted the following prayers and instructed the jury as follows, to wit:

1. Where a married woman holding savings bank stock derived by gift or conveyance from her husband agrees, with his consent, to convert the stock into national bank stock, she thereby regularly and legally acquires title to the latter stock; and, although she still holds the new stock subject to the marital rights of the husband, she is, nevertheless, subject to the individual responsibility of national bank stockholders, and may be assessed for all losses and be compelled to pay out of her other estate to the amount of the par value of her stock.

* * * * * * *

2. The liability incurred by a holder of national bank stock, to be assessed to the amount of the par value of the stock for all losses of the bank, is a statutory liability, and not a contract one. It is a liability imposed by the statute as an incident of the ownership of the stock, and attaching to all who are capable of that ownership without reference to any supposed voluntary assumption of the liability by express or implied contract. Therefore where national bank stock is held by a *feme covert*, either in her own right or subject to the common-law marital rights of her husband, the liability to be assessed affects her alone, and a suit to enforce the collection of the assessment is properly brought against her without
56 joining her husband, as would be necessary in the enforcement of any common-law obligation or liability of the wife.

3. Fraud must be affirmatively and positively proved, and cannot be found by conjecture in the absence of such affirmative proof.

To the giving of each of said instructions and the granting of each of said prayers counsel for defendant objected at the time, and exceptions were duly noted at the time.

Seventh Bill of Exception.

And after the opinions mentioned in the foregoing exceptions, and after the evidence set forth in the first bill of exception (which is made part of this bill of exception and was the whole evidence in the case), the court gave the following charge to the jury:

WASHINGTON, D. C., *November* 22, 1883.

The banking act provides that upon the failure of one of these national institutions the Comptroller of the Currency shall appoint

a receiver to take charge of its assets. That has been done in the present case, and the suit is in the name of the receiver. It also provides for the liability of the shareholders to the amount of the par value of their stock for the purpose of paying the creditors of the bank. These steps of the act appear to have been complied with, and this action is instituted for the security of the creditors of the bank. If Mrs. Hitz was a shareholder in this institution she is responsible, under the act, in her individual capacity for the par value of the stock which she held.

The evidence with regard to Mrs. Hitz being a shareholder is the fact that she is credited on the stock book of the bank with 200 shares of stock; and, in corroboration of that fact, there have been introduced a petition, purporting to bear her signature, requesting
that the old savings bank should be transmitted into a
57 national bank, and also checks, which purport to bear her
signature, for the dividends upon this amount of her alleged stock in the bank. This ordinarily would be sufficient to establish the relation of the party to the bank as a shareholder.

It is contended on the other side that a person cannot be forced into the relation of a shareholder without his consent, act, and knowledge, or without he has ratified it afterwards by some act of an unequivocal nature; and that constitutes the defense here.

Mrs. Hitz has been examined as a witness; and she testified that she never purchased any stock, never paid for any stock, and knew nothing about stock standing in her name upon the books of the company, or about her being the owner of any of that stock until after the bank had failed.

[Mr. Mattingly and Dr. Donaldson have been examined as witnesses. It appears from the transfer book that ten shares of these 200 shares which are alleged to belong to Mrs. Hitz were transferred by each of these parties. They both stated that they never had any negotiation with Mrs. Hitz about it; they both state that they were not the owners of the stock; that they never received any consideration for it, and that they never knew nothing about its transfer. The other seven shares appear to have been transferred by Mr. Prentiss, who was the cashier of this bank. To that extent Mrs. Hitz seems to be corroborated, so far as relates to the transfer of this stock in her name.

Now, if these statements are correct and credible, it would appear that Mrs. Hitz is not responsible to this assessment;] but, as I have already remarked, the receiver relies upon the fact that, however it may be with regard to her making an actual purchase of this stock, or however it may be with regard to her knowledge of its standing in her name, she has performed such acts after it stood in her name as to estop her from denying that she is a stockholder.

It appears that this stock stood in Mrs. Hitz' name at the
58 time the savings bank was converted into a national bank.
It appears further that the banking act requires that, in making this kind of conversion from one institution to another, a certain number of stockholders should request it to be done by petition. Such a document was executed in this instance. Mrs. Hitz' name

appears to be upon that document, and the checks come in with the same category.

There is a general instruction asked for on the part of the receiver to the effect that these acts are of such a decided character as to estop Mrs. Hitz from denying that she was the owner of this stock, or at least that they established the fact that she has ratified the transfer of this stock in her name, and that certainly would be a very strong circumstance to prove a ratification.

[It is said, on the other hand, that it is at least doubtful whether she ever signed those papers. The most that Mrs. Hitz can say about it herself is that she does not remember signing them; but she, as I understood her statement, does not undertake to deny positively that those are her signatures. Perhaps it would be a somewhat difficult question to determine upon that testimony. A person may have affixed his signature to a document and have entirely forgotten it. It will then depend very much upon the circumstances of the case whether a person executing instruments of this description would be likely to forget it, or whether it is one of those transactions that would make such an impression upon a mind of ordinary strength as to leave its impression permanently.] That is one view of the case.

Another view of the case is presented by the instruction which is sought on the part of the defendant, that these acts did not amount to a ratification of the transfer of this stock unless she was aware of the circumstances that the stock stood in her name, and I think that that is a correct proposition. [The inference, of course,
59 would be that she understood, and must have understood, that if she signed those instruments deliberately the stock was in her name, or some portion of the stock; but on the other hand is her positive testimony that she knew nothing about it, and it is contended on the part of Mrs. Hitz that those signatures, if genuine, were obtained from her by some piece of management that prevents them amounting to a ratification, because, if the signatures were obtained from her by fraud or by misrepresentation, it would not amount to a ratification.] In order, in other words, for an act to amount to a ratification the person must understand the act they are about executing and its reference to the main fact which is sought to be corroborated.

Now, it is very properly claimed on the part of the receiver that fraud is a fact that is not to be inferred or conjectured, but must be proved. Well, that is a wholesome and just principle of law; and when it is claimed that these signatures were obtained from Mrs. Hitz fraudulently and as a part of the fraud which was perpetrated in her name from the outset it must be proved. [This does not mean that the proof of fraud is to be direct and positive, because fraud can scarcely be ever proved by direct and positive testimony, but it means this, that like any other fact or circumstance it may be proved by other circumstances that produce a moral impression that fraud has been committed. In other words, it may be proved by circumstantial testimony. If the circumstances in the case indicate

fraud that fulfils the requirement of the law, "that fraud must be proved."]

I dictated an instruction because I was not entirely satisfied with the way in which the principle of law sought to be invoked was expressed. [My instruction was to the effect that if it shall appear to the satisfaction of the jury that Mrs. Hitz never purchased this stock, either directly or indirectly—that is, by herself or
60 agent—that she knew nothing about it, she would not be responsible as a shareholder for an assessment of this kind.]

That is to be taken, of course, in connection with what I said about a ratification, and if you come to the conclusion that Mrs. Hitz ratified this, although she did not make the purchase originally upon a fair understanding of the circumstances of the case, the verdict must be against her. [If, on the other hand, sheh as not ratified it and knew nothing about it, nothing could be more unjust than to hold her responsible for the face value of the stock which she never owned and never purchased and knew nothing about. In that case she would be entitled to a verdict.]

To the portions of the above charge enclosed in brackets the plaintiff, by his counsel, objected; but, notwithstanding the fact that there was no other evidence in the case save that which by reference is made part of this exception, the court overruled the objection and gave the same; to which opinion of the court overruling the said objection and giving the said instructions the plaintiff, by his counsel, then and there and before the jury retired excepted and tendered this bill of exception, which is received, signed, sealed, and ordered to be made a part of the record in this cause this 5th day of December, 1883, *nunc pro tunc*.

MACARTHUR, *Justice*. [SEAL.]

Settled by counsel this 5th day of December, 1883.

LEIGH ROBINSON, *For Pl'tf.*
ENOCH TOTTEN, *For Def't.*

61 *Court Proceedings.*

Supreme Court of the District of Columbia.

Proceedings before the supreme court of the District of Columbia, in general term, commencing on the first Monday, 6th day of October, 1884.

Present: Justices MacArthur and James.

* * * * * * *

TUESDAY, *December* 23, 1884.

Session resumed pursuant to adjournment.

Present: Chief Justice Cartter and Justices MacArthur and James.

B. U. KEYSER, Pl'ff,
vs. } At Law. No. 22261.
JANE C. HITZ, Def't.

This cause having been heard by the court here, upon the record

of the special term, because it thereupon appears to the court that there is no error in the judgment of the special term: Therefore it is considered by the court here that the said judgment be, and it is hereby, affirmed with costs to be taxed by the clerk, and that the defendant have execution therefor.

62 Filed Dec. 7, 1885. R. J. Meigs, Cl'k.

In the Supreme Court of the District of Columbia, the 20th Day of October, 1885.

BENJAMIN U. KEYSER, Receiver,
vs.
JANE C. HITZ. } No. 22261.

In error.

Know all men by these presents that we, Benjamin U. Keyser, receiver German-American National Bank, and John W. Dick, are bound unto the above-named Jane C. Hitz in the sum of two hundred dollars ($200.00), to be paid to the said Jane C. Hitz, her executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated this 20th day of October, 1885.

Whereas the above-named Benjamin U. Keyser, receiver, &c., has prosecuted his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Benjamin U. Keyser, receiver, &c., shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

BENJAMIN U. KEYSER, [SEAL.]
Receiver.
JOHN W. DICK. [SEAL.]

Sealed and delivered in presence of—
LEIGH ROBINSON.

Approved:
W. S. COX, *J.*

63 Filed Dec. 7, 1885. R. J. Meigs, clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between Benjamin U. Keyser, receiver, plaintiff, and Jane C. Hitz, defendant, No. 22261, at law, a manifest error hath happened, to the great

damage of the said plaintiff, as by his complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 7th day of December, in the year of our Lord 1885, and of the Independence of the United States the 110th.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *To wit:*

To Jane C. Hitz:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Benjamin U. Keyser, receiver, is plaintiff, and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER, *Ch'f Just.*

Service admitted this 5 day of February, 1886.

ENOCH TOTTEN, *For Def't.*

[Endorsed:] No. 22261. At law. Keyser, receiver, *vs.* Hitz. Writ of error S. C. U. S. Filed Dec. 7, 1885. R. J. Meigs, clerk.

64 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 5th day of February, 1886.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 5th day of February, 1886.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 5th day of February, 1886.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

Endorsed on cover: District of Columbia supreme court. No. 303. Benjamin U. Keyser, receiver of the German-American National Bank, of Washington, D. C., plaintiff in error, *vs.* Jane C. Hitz. Filed July 26th, 1886.

Office Supreme Court U. S.
FILED.
OCT 16 1889
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

October Term 1889.

BENJAMIN U. KEYSER,
Receiver of the German-American
National Bank,

vs.

JANE C. HITZ.

No. 42.

BRIEF FOR PLAINTIFF.

LEIGH ROBINSON,
Attorney for Plaintiff.

R. O. Polkinhorn, Printer, 632 and 634 D St., Washington, D. C.

Supreme Court of the United States.

October Term 1889.

BENJAMIN U. KEYSER, Receiver of the German-American National Bank,

vs.

JANE C. HITZ.

No. 42.

This is an action brought by the Receiver of a National Bank to recover from a shareholder the amount of the assessment, ordered by the Comptroller of the Currency to be made upon 200 shares of the stock of the bank, standing on the books thereof in the name of the defendant.

At the trial, it was shown by the plaintiff that the defendant had been the owner of 200 shares in the German-American Savings Bank (which was afterwards converted into the bank of which the plaintiff is receiver); that on Jan. 21st, 1876, 173 shares of the stock of this Savings Bank had been transferred to her by John Hitz, the president of the bank, and husband of defendant; that on the same day ten shares had been transferred to her by Wm. F. Mattingly, through his brother, as his attorney; ten shares by R. B. Donaldson, and seven shares by C. E. Prentiss —in all 200 shares; that the old certificates for this

stock were surrendered and cancelled, and new certificates issued in their place (Rec., p. 11); and that the new certificates were issued to the defendant (Id.) Messrs. Mattingly and Donaldson were directors in the bank. A book of the bank, which was in evidence, showed the stubs of the old certificates, which were cancelled, and the stubs of the new certificates issued to Mrs. Hitz. (Id., 18.)

It was further shown that during the whole time that the defendant held the stock of this bank, it was yielding dividends at the rate of 8 per cent. per annum, and three checks for such dividends, bearing date respectively May, 1st, 1876, Nov. 1st, 1876, and May 1st, 1877, were made payable to her order, endorsed by her, and paid at the bank. (Id., 19.)

On the 7th day of the month and year last mentioned, viz, on May 7th, 1877, the stockholders of the German-American Savings Bank applied to the Comptroller of the Currency for the conversion of said bank into a national bank, each shareholder signing the application, with a statement of the number of shares owned at the time by the signer. Among the names of the stockholders thus subscribed is that of the defendant, and the number of shares owned by her is stated to be 200. (Id., 12.) The application concludes: "In witness whereof *we* have hereunto set our hands *and written the number of shares owned by us respectively*, this seventh day of May, A. D. 1877." (Id.) The number of shares, as well as the name of each shareholder, was written by the shareholder.

The law only required the trustees of the Savings Bank to be authorized by the owners of two-thirds of the capital stock thereof, for the purpose of effecting this conversion. The record shows that in point

of fact the application was signed by every stockholder but one. For the organization certificate made by the trustees has appended thereto the name and residence of every shareholder of the Savings Bank, and the only one not subscribed to the application to the Comptroller is that of Geo. M. Kober, Camp McDamit, Nevada, the owner of five shares. (Id., 17.) Of all the subscribers, the only one who has ever endeavored to cast any doubt on the genuineness of the subscription is the present defendant, the wife of the president.

On the 14th of May, 1877, the Acting Comptroller of the Currency gave the certificate required by law that the German American-National Bank was authorized to commence the business of banking. (Id., 15.) The books of the old bank were transferred to the new, and the stockholders of the old became the stockholders of the new bank. The two banks used in reference to the transfer of stock the same identical books, and the business of the National Bank was continued in the book of the former Savings Bank. (Id., 20.) Sworn lists of the stockholders of the German-American National Bank were from time to time furnished to the Comptroller of the Currency, in conformity with law, all of which included the defendant's name. (Id., 28, 29).

The German-American National Bank failed on October 30th, 1878. (Id., 22.) On November 1st, 1878, the plaintiff was appointed Receiver thereof, by the Comptroller of the Currency. (Id., 10.) The Receiver furnished the Comptroller with a statement of the assets and liabilities of the bank, together with a list of the stockholders, obtained from the records of the bank. (Id., 19.) The list of share-

holders showed the defendant to be the owner of 200 shares of the German-American National Bank. (Id., 28.) Upon this information, the Comptroller ordered the assessment upon the shareholders. (Id., 19.) The Receiver "notified Mrs. Hitz of this assessment upon her, and requested payment on her shares of stock; and the payments have not been made." (Id., 23.)

There was no valid objection to any part of the plaintiff's case. No demurrer to the evidence. No motion to instruct for the defendant. There was, indeed, at the close of the plaintiff's case, a wholesale objection "to the reading in evidence to the jury of each and every of the foregoing transfers, books, certificates, papers, paper writings, and documents," offered by the plaintiff and admitted by the court, but no reason for this objection was given, and there was nothing on which the court could act, except the deep seated repugnance of the defendant to the proof of a liability affecting her.

It is true that in attempted contradiction of the plaintiff's case the defendant denied that she ever held this stock, but upon being shown her endorsement on the series of checks, expressed to be for dividends, payable on stock, standing in her name in the Savings Bank, (8 per cent. on $20,000) she was unable in a single instance to deny that the signature appearing thereon was her own genuine signature. "Do you say," asked her counsel, "You never wrote your name on the back of those checks?" A. "No, sir; I cannot say that. I have no recollection of having done so." (Rec., 33.) On cross-examination the following dialogue occurred. Q. "You are unable to deny that that is your signature? A. "I

cannot positively deny that it is." Q. "Can you deny *at all* that that is your signature?" A. "I can deny having any recollection of having signed them." Q. "Can you deny that it is your signature?" A. "*I cannot deny it.*" (Id.) The evidence shows that these checks went to the credit of the defendant's husband, as Consul General, he having an account, under that designation, in the bank. (Id. 22.) The defendant testifies that while she was in Europe the salary of her husband, as Consul General, was paid to her there, and that this amounted to $3,000. (Id. 33); *and that the defendant's husband was in charge of and had the management of all her personal property.* Id. The defendend testified that she had forgotten her execution of other papers, equally important, among others two deeds, (Id.) Upon being shown her signature to the application for the conversion of the Savings Bank into a National Bank, set opposite to the number of shares held by her, the defendant was unable to deny the genuineness of this signature also. (Id. 31.)

The signatures to the transfers of Stock to the defendant by Messrs. Mattingly and Donaldson were proved by these gentlemen to be genuine signatures. (Rec., pp. 26, 27.) Mr. Mattingly says he does not remember the transaction, in which the stock of the Savings Bank, standing in his name was transferred to the defendant, but he supposes it was rightly done. Dr. Donaldson says he has no recollection of the matter, but acknowledges as his own the signature to the transfer. At the time of this transfer Dr. Donaldson was vice-president, and Mr. Mattingly director of the bank. Of course, neither gentleman meant to imply that he was agent and participant,

in the perpetration of a fraud, or injustice of any kind. Their failure to remember simply supplies one more piece of evidence, as to the ease with which transactions may be forgotten, and the wisdom of supplying the infirmity of human memory by the permanence of written proof.

During the trial of this cause in the Circuit Court, several errors were committed in the decisions of the Court of which the plaintiff complains, and to bring them distinctly before this Court the plaintiff makes the following

Assignment of Errors.

1. The Court erred in permitting the defendant to testify that it was impossible for her to have forgotten the dividend checks which bore her undisputed endorsement, and erred in permitting the defendant to be asked and to answer as to whether she had been consulted as to the organization of the *Savings Bank*. (Rec., p. 34.)

2. The Court erred in its invitation to the jury to find that the stock of the savings bank was transferred to her without her knowledge or consent, in the face of her written sanction and confirmation thereof. (Rec., p. 34.)

3. The Court erred in saying to the jury (without foundation therefor in the evidence), that if they found from the evidence that the defendant was procured to sign the application to the Comptroller of the Currency *for the establishment of the German American National Bank* by fraudulent means and representations, the said paper shall not be taken as a consent to or ratification of such change, or a con-

firmation of the transfer to her of such stock on the books of the *Savings Bank*, (Id. 35); and that if they found from the evidence that the defendant was induced to endorse the three dividend checks drawn upon the German American Savings Bank by means of fraud or misrepresentation, or by concealing from defendant facts concerning them, such checks shall not be regarded as a confirmation of the transfer of stock nor as evidence against her (Id).

4. The Court erred in saying to the jury (in the absence of evidence to justify it) that if the said stock was transferred to the defendant *for fraudulent purposes, by or at the instigation of her husband* and without her knowledge or consent, such transfer was void, and the defendant entitled to the verdict. (Id. 36).

5. The Court erred in its opinion that if at the time the stock was transferred to the defendant on the books of the Company, she had not purchased the stock or authorized it to be purchased, directly or indirectly, and knew nothing about it, she was not responsible as a shareholder to contribute upon an assessment of this kind. (Id 36).

6th. The court erred in the opinion that if the statements of Messrs. Mattingly and Donaldson (that they never had any negotiations with Mrs. Hitz, about the stock transferred to her by them, and remembered nothing on the subject), were correct and credible, the defendant was not responsible to this assessment. (Id., 38.)

7th. After the court had stated to the jury: "The most that Mrs. Hitz can say about it herself is that she does not remember signing them" (i. e., the

papers in the case bearing her signature,) "but she, as I understand her statement, does not undertake to deny positively that those are her signatures," it was error to add: "Perhaps it would be a somewhat difficult question to determine upon that testimony." (Id., 39.)

8th. The court erred in saying to the jury (notwithstanding the destitution of proof upon the subject), that it was contended on the part of the defendant that those signatures "were obtained from her by some piece of management that prevents them amounting to a ratification, because if the signatures were obtained from her by fraud or by misrepresentation, it would not amount to a ratification." (39.)

9th. The court erred in saying to the jury (in the condition of the proof), "If the circumstances in the case indicate fraud, that fulfils the requirement of the law, "that fraud must be proved." (40).

Points and Authorities.

First. Notwithstanding the fact that the defendant admitted she had forgotten her execution of other papers, including two deeds (Rec., 33) notwithstanding the fact that two other witnesses had equally forgotten their signatures to papers, which, nevertheless were unquestionably genuine, (id., 26-27), the defendant was permitted to testify that she could not have forgotten the dividend checks. This is the whole substance of the evidence in rebuttal of the plaintiff's case. The syllogism is as follows: It would have been impossible for the defendant to have forgotten the dividend checks, if she had endorsed them. But she had forgotten them, Ergo ; then she did

not endorse them, notwithstanding the fact that she is unable to deny that she did. The question of her counsel was "*Assuming that you did endorse those checks*, if the nature of the checks had been explained to you by anybody, could you have forgotten them?" But of what possible importance could it be, whether a word of explanation was or was not uttered at the time of her endorsement. They might have been sent to her when she was in Europe; they might have been handed to her by an employee of the bank. The endorsement of checks, in express terms made payable to her order, "*on account of stock standing in her name on the books of this bank*," and expressly made chargeable to "*dividend account No.* 3,300," (Rec., 19,) is conclusive evidence in writing of the ratification of the transfer by the transferee. The present ignorance of the defendant (with whom wholesale forgetfulness would seem to be the rule), is not evidence of original ignorance of the transfer of this stock; nor does the mere failure to remember the fact of signing impair the force and effect of a signature not disputed to be genuine.

It was likewise error in the judge to say by implication to the jury, that it made a particle of difference whether the defendant was or was not consulted as to the organization of the Savings Bank. This bank was incorporated September 23d, 1872. (Rec., 24), four years before the defendant became a stockholder therein. (Rec. p. 10.) It might have been organized prior to her birth, without affecting any questions in this case. It cannot possibly alter the liability of any stockholder in the German American *National Bank*, that he or she had not been con-

sulted as to the organization of the German American *Savings Bank*. To permit evidence to be given on this subject, over the objection of counsel, was to make that relevant and material, which was intrinsically irrelevant and immaterial.

Second and Third. After the jury had been told by the court that their verdict must be for the defendant, if the stock in the Savings Bank was transferred to her without her knowledge, unless they found from the evidence that she subsequently and knowingly ratified and confirmed such transfer, they were further told, that if the defendant's signature to the application to the Comptroller of the Currency *was procured by fraudulent means and representations*, it would neither be a ratification of the transfer, nor a consent to the conversion into a National Bank, and that if the defendant was induced to endorse the three dividend checks, *by means of fraud or misrepresentations, or by concealing from defendant the facts concerning them*, these writings were not evidence of ratification; nor evidence at all. (Id.)

Waiving the familiar principle that where a party alleges facts in avoidance of a claim, the burden of proof is upon the party, that acquiesence in the transfer of valuable property is to be presumed on the part of the donee, and that in the case at bar, it was not for the plaintiff to prove it, but for the defendant to disprove it by unequivocal testimony, it is enough to say that the jury were here told in distinct instructions, that if the defendant's signature was procured to the application to the Comptroller, "by fraudulent means and representations," or if she was induced to indorse the dividend checks "by means of fraud or misrepresentations," then

the verdict should be for the defendant, in the absence of a single syllable of testimony that any fraud or misrepresentation was used in either case.

Not only are no misrepresentations proved to have been made, at the time of either signature, but no representations are so much as referred to, or, by the testimony of any witness suggested. The record will be searched in vain for the testimony as to any fraud, which was practiced on any body.

The charge of the Court should always be based upon the facts as proved, and not upon an assumed state of facts, which has no existence under the evidence in the case. When, therefore, a Court told the jury they might look *into the facts* to see whether there had been any distribution of an intestate's property, in the absence of evidence that there was such distribution, such charge was held erroneous. *Paschal* vs. *Davis*, 3 Ga., 256; *Hollister* vs. *Johnson*, 4 Wend., 643; *Reed* vs. *Greethouse*, 7 T. B. Mourse, 558. A judge should not charge a jury on a point upon which no testimony has been offered. "Instructions on abstract points ought not to be given, however correct the principles assumed may be." *Brown* vs. *Williamson*, 1 Litt., 230. "An instruction must be based on evidence." *Hite* vs. *Blandford*, 45 Ill., 12. "That the Court submitted a matter to the jury without evidence of it has become a standing assignment of error, it might be stereotyped." *Myers* vs. *Hart*, 10 Watts., 107. "In all cases where misrepresentations are to be proved, *we must first show the representations actually made before we can proceed to prove that they are misrepresentations.*" *Patterson* vs. *Arnold*, 45 Pa. St., 416; *McDonald* vs. *Trapton*, 15 Me., 228.

Where it is sought to avoid a contract because of fraudulent misrepresentations, it must be stated in what the misrepresentations consisted, and they must be matters of fact of which the defendant was ignorant. *People* vs. *Board*, 27 Cal., 656.

The language of Woodward J., in *Sartwell* vs. *Wilcox*, is strictly applicable to the rulings complained of by the plaintiff here:

fraud

"We see no suggestion offered in this record, *except in the charge of the court.* * * * Yet the court, in answering affirmatively the plaintiff's point, told the jury twice that if there was any fraud by the plaintiff, or if the means used to obtain the agreement were a mere trick and deceitful device, the agreement would not bind, and added *the facts are for the jury.* It has often been ruled to be error to submit a question of fact to the jury of which there is no evidence. *And generally no fact is less helped by presumptions, or more dependent on direct proof, than actual fraud.* It is never to be presumed. * * It was error, therefore, to submit the question to the jury." 20 Pa. St., 122.

Equally applicable is the language of Strong, J.:

"Fraud, it is true, avoids all contracts, but fraud consists in false representations of things as facts, which are not such, or in deceitful concealment of existing facts, *neither of which is found in the evidence.*" *Grove* vs. *Hodges*, 55 Pa. St., 519.

Fourth. The instruction of the court that if this stock was transferred to the defendant "*for fraudulent purposes, by or at the instigation of her husband,*" she is entitled to a verdict, is subject to the same criticism; but the injury is aggravated by the definite location of fraud, and of exceptionally infamous fraud, where the testimony is absolutely blank. It

is not the transfer, but the evidence which is void. Not only the testimony is a blank upon the subject, but it is plainly impossible for it to be anything else. The fraud imputed is an impossible and an inconceivable fraud. The transfer of $20,000 of stock, in a perfectly sound bank, a bank which was never even suspected of unsoundness, and which paid 8 per cent dividends all the days of its life, could not be fraudulent. X

The stock, which was transferred to the defendant, was stock for which $20,000.00 had been paid. For the law of the United States, under which this Savings Bank was incorporated (Rec., p. 24), enacted that "no shares shall be transferrable until all previous calls thereon shall have been fully paid in." (R. S. D. C., § 561.) It also enacts that the president (who in this case was the husband of the defendant) and a majority of the trustees within thirty days from the payment of the last installment of the capital stock shall certify to the same under oath. (Id., 563); that the whole capital stock shall be paid in within two years from the incorporation of the company, or the incorporation be dissolved (Id., 564); that nothing but money shall be considered as payment of any part of the capital stock (Id., 564); and that annually, within twenty days from the first of January, a report stating the amount of capital, and the proportion actually paid, signed by the president and a majority of the trustees, and verified by oath, should be published in a newspaper in the District, and filed in the office of the recorder of deeds. (Id., 566.) This Savings Bank was incoporated September 24, 1872. (Rec., 25.) The transfer to the defendant was made on January 21st, 1876. (Id., 11, 18.)

X Such testimony could not have been admitted. Stein v Bowman 13 Peters 223

It was further made the duty of the trustees to cause a book to be kept containing the names of all persons who within six years had been stockholders, showing their place of residence, and the number of shares held by them respectively (Id., 579); and that such book, during the usual business hours of every business day, should be open for inspection of stockholders and creditors. (Id., 580.) In the nature of things the transfer of this stock was not made in a corner, nor was its ownership a secret. It was ascertained and published to the world over the oath of the defendant's husband. The plaintiff once more employs and adopts words which are singularly appropriate:

"There is no proof of fraud, and there is abundant evidence of a subscription. An allegation of that, which were worse than Punic faith, is not a defence to such a contract, nor ground to justify the repudiation of it. *Graft* vs. *R. R. Co.*, 31 Pa., St., 489.

Fifth. The error complained of in this assignment is palpable, and it is an error by which the plaintiff was concluded. The jury were distinctly told that it at the time the stock was transferred to the defendant on the books of the company (*i. e.* of the Savings Bank), she had not purchased the stock, or authorized it to be purchased, directly or indirectly, and knew nothing about it, she was not responsible as a shareholder.

In the first place, it is apparent that the jury are limited to the inquiry, whether the defendant herself purchased and paid for the stock, when it was immaterial whether it was a purchase or a gift, or whether purchased by herself directly or by her

agent for her. But suppose at the time of transfer the defendant had not expressly authorized the particular purchase; suppose she did not learn of it for a week afterwards, or a month, or six months, when she received her first semi-annual dividend, how could this affect her liability? If ignorance of a purchase of stock, at the time it was made, is to exonerate a shareholder, and subsequent forgetfulness is accepted as the proof of contemporary ignorance, who shall be held? How many purchases of stock can be sustained, if this surprising outgiving be the law?

In this case, it is proved, that the defendant's husband, by whom this transfer was directed, had the management of all her personal property (Rec. 33). This is the uncontradicted proof. The instruction of the court leaves out of view, and excludes from the jury the doctrine of agency, as well as the doctrine of ratification. A party cannot "by holding his peace have the benefit of the contract, if it should afterwards turn out to be profitable and retain a right to repudiate it if otherwise," *Daw* vs. *Cross*, 1 Black 539. A party cannot ratify that part which is beneficial to himself and reject the remainder; he must take the benefit to be derived from the transaction *cum onere*. *Mundorf* vs. *Wickersham*, 63 Pa., St. 87.

"A Married woman is at liberty to avail herself of the agency of her husband as if they had not been united in marriage." *Owen* vs. *Cawley*, 36 N. Y. 600.

When married women clothe others with apparent authority to act for and bind them, the apparent

must be taken as the real authority, and they are estopped from disputing it, so far as others have been induced to act upon the faith of it. *Bodine* vs. *Killeen*, 53 Id., 93; *Premain* vs. *Allen*, 15 Hun., 4.

Where an agent does any act for the use of his principal, and the principal enjoys the benefits and fruits of the act, he shall not afterwards be allowed to say that the act was illegal. *Ruggles* vs. *Washington County*, 3 Mo., 496; *Hastings* vs. *Bangor House*, 18 Me., 436; *Law* vs. *Connecticut &c. R. R. Co.*, 46 N. H., 284; *Reid* vs. *Hibbard*, 6 Wis., 175; *Beiman* vs. *Goodell*, 56 Iowa; *Waterson* vs. *Rogers*, 21 Kan., 529; *Havil* vs. *Peck*, 7 East. 164; *Cornwell* vs. *Wilson*, 1 Ves., 509; *Farmer's &c. Co.* vs. *Dalworth*, 1 Comst., 433; *Clark* vs. *Ralls* (Iowa), 24 N. W. Rep., 567.

In the present case the husband was the agent by appointment, as he was also the natural agent to have the management of the personal property of the defendant. But had he not been agent by appointment, he would have become such by ratification, by the receipt and assignment of the dividends on the stock transferred. The law will not endure that a person shall keep the product of the act of his agent and repudiate the latter's authority. *Coykendall* vs. *Constable*, 99 N. Y., 309. "Even in a case of fraudulent representations by the agent, never at all authorized or suspected by the principal, a reception and retention of the proceeds may make the latter responsible for the fraud." Id. *Met. L. Ins. Co.* vs. *Munch*, 53 Id., 144; *Hathaway* vs. *Johnson*, 55 Id., 93; *Cobb* vs. *Hatfield*, 46 N. Y., 533; *Masson* vs. *Bovit*, 1 Derrio, 69; *Voorhees* vs. *Earl*, 2 Hill, 288; *Hogan* vs. *Wager*, 5 Id., 389;

Southern Express Co. vs. *Palmer*, 48 Ga., 85; *Maddux* vs. *Bevan*, 39 Md., 485.

But in the case at bar the conclusion from the ratifying acts present in the proof was expunged by an inference from circumstances, as plainly absent from the proof,—that too in a case where ratification may justly be deemed to have been dispensed with, by the express and admitted agency of the husband at the time, and prior and subsequently thereto.

Hovey v. *Blanchard*, 13 N. H. 145.

The husband of this defendant was an authorized agent for the transaction of all her business; admitted by herself to have been such agent (Rec. 33) she having accredited him to the world, by whom, in the world, was she to be discredited when acting in that avowed capacity.

The defendant accepted the benefit of this transfer while there was benefit to be accepted, and disclaimed ownership, for the first time, when the burden descended, and it was no longer possible to place the title in any other.

A wife who permits her husband to control her property is bound to notify third parties if he exceed his authority. *Barger* v. *Kaiser*, 17 Ill. App. 505. *A married woman who authorizes her husband as her general agent to manage her property invested in business, cannot escape liability for his purchases for the business on credit, although she had given him private instructions not known to the seller to sell for cash.* *Louisville, &c., Co.* v. *Stokes*, 78 Ala. 372.

Sixth. After the rulings and instructions, which are the subject of the foregoing assignments of error, had been made and given, the counsel for the plaintiff sought to remonstrate with the court, by reading

extracts from the opinion of the General Term, and by calling the attention of the court to the necessity of some positive and affirmative proof of fraud, as the preliminary of any instruction on the subject. The response of the court to this was to give the extract from the opinion of the General Term, and the substance of what was said about fraud in the shape of further instructions. At the instance of defendant's counsel and to prevent disagreement, the same are included in the record. (37.)

Having done this much, for the consolation of the plaintiff, the trial judge then gave the following opinion, which of itself and by itself decided the case for the defendant, to wit, *that if the statements of Mr. Mattingly and Dr. Donaldson were correct and credible, "It would appear that Mrs. Hitz was not responsible to this assessment."* (Rec., p. 38). The statement of Mr. Mattingly was that ten shares of this stock had been transferred to the defendant, by his brother, as his attorney; that whatever was done by his brother was rightly done, but that he himself had no remembrance of the transaction (Id. 26). The testimony of Dr. Donaldson was, that the signature to the transfer of stock, which reads: For value received, I hereby assign and transfer to Jane C. Hitz, all my right, title and interest in ten shares of the German American Savings Bank, &c. (Rec., p. 11), was his own genuine signature, but that he had no remembrance of the transaction (Id. 27.) *The court tells the jury that if these statements (that these shares were transferred by these gentlemen and that they had forgotten the circumstance) are correct and credible, then the defendant is not responsible.* The statements, of course, were

correct and credible. The witnesses had transferred the stock, and had forgotten in 1883 the events of 1876, and the jury are told that unless these witnesses have perjured themselves, the defendant must go scot free. For the Receiver of a broken bank to enforce the Comptroller's assessment, under such administration of the law, is not difficult, *it is impossible.* The statements of these witnesses, which only referred to 20 of the 200 shares, and were immaterial as to them, were not contradicted, and in the nature of things could not be. No one can testify that a man does remember what he himself says he does not. Yet the jury were told that if they believed these statements to be "correct and credible," Mrs. Hitz was not responsible to the assessment, not only to that particular fraction of it, but to any of it. This left the jury no alternative but to find against the plaintiff.

Seventh: It is not necessary to repeat the words excepted to in this assignment. The court tells the jury that it is "at least doubtful" whether the defendant ever signed the papers to which her name is subscribed, when there is no doubt on the subject in the testimony. It is added, "The most that Mrs. Hitz can say about it herself is that she does not remember signing them; *but she, as I understood her statement, does not undertake to deny positively that those are her signatures.* Perhaps it would be a somewhat difficult question to determine upon that testimony."—i. e., the testimony that she was wholly unable to deny having signed them. (Id. 39). But in what consists the difficulty of deciding upon testimony which is not contradicted, even were the

failure to contradict no greater than that stated by the court? In point of fact the defendant said, not only that she should not deny positively, but that she could not deny at all the genuineness of her signatures. (Id. 33). The trial judge himself assigns the reason why mere forgetfulness proves nothing. "A person," he says, "may have affixed his signature to a document and have entirely forgotten it." (Id. 39.) The court then leaves it to the jury to say, whether the forgetfulness of a signature by a party, who does not dispute it to be genuine, is not tantamount to its denial. Surely when on the trial of a cause a fact is distinctly alleged and shown by the plaintiffs and not denied at all by the defendant, it is error for the court to indicate to the jury, that the fact is in dispute, and to submit to them the question whether it occurred or not. *Youngman* vs. *Miller*, 38 Leg. Int, (Pa).

If the refutation implied in such oblivion be once admitted, it would be difficult to determine within what limits it may be restrained. *The Evening Star* of November 23, 1883, has this paragraph:

"A petition, signed by Elizabeth Cowling, was filed in the probate court on the 2d instant, praying that she be appointed guardian to the orphan children of Thomas Cowling, and the order was made to-day. Another petition was filed by the same person, and signed Elizabeth Gladman. The petition stated that she married a man named Gladman, since the death of Cowling; that she lived with him only a few days, never took his name, and forgot her proper name was Gladman."

Eighth. In further refutation of the plaintiff's proof, and argument to overthrow it, the court told

the jury; "The inference, of course, would be that *she understood, and must have understood, that if she signed those instruments deliberately, the stock was in her name.*" So far rightly said. This is an irresistible inference. "*She must have understood.*" Then *per contra* the same judge says, "But on the other hand is her positive testimony that she knew nothing about it, and it is contended on the part of Mrs. Hitz that those signatures, if genuine, were obtained from her by some piece of management that prevents them amounting to a ratification, because, if the signatures were obtained from her by fraud or by misrepresentation, it would not amount to a ratification." (Id., 39.) In a case in which it must be repeated, there is not a scintilla of evidence that there was either fraud or misrepresentation! Where is this suggested state of facts; where is this contention on the part of Mrs. Hitz? Not in the proof. The difficulty in regard to this series of suggestions, is the total want of evidence to support a single one of them. *Pinger* v. *Leach*, 70, Mo., 43.

Ninth. As has been seen, in answer to the plaintiff's remonstrance, the court did tell the jury, that "fraud must be affirmatively and positively proved," (Rec. 37). But as the court neither recalled nor modified the instructions on the subject of fraud already given, the court, in giving the law as understood by the plaintiff, simply intensified the instructions already given at the instance of the defendant. For the court said, in effect, though fraud is never to be presumed, the instructions on the subject are nevertheless applicable: Ergo, here there is more than presumption, here is proof. But in case the

jury failed to grasp this implication, the court in the charge to the jury cleared the point from all obscurity. After referring to the claim on the part of the receiver that fraud must be proved, and adding "Well, that is a wholesome and just principle of law;" that is, we are left to infer, if it has any real application to the case at bar, though perhaps, in any event, a trifle high-flown and abstract, the court explains, "This does not mean that the proof of fraud is to be direct and positive." (Id. 39). "A moral impression that fraud has been committed," is the true evidence. "If the circumstances of the case *indicate* fraud, that fulfills the requirement of the law that ~~that~~ fraud must be proved." (Id. 39.) A charge to the jury that they have a right to draw an inference which is opposed to all the testimony, is erroneous. *Carey* vs. *Hughes*, 17 Ala., 388. It is equal error to lay down a correct qualification of a rule of law, when there is no evidence touching the subject matter of the qualification. *Webb* vs. *Robinson*, 14 Ga., 216. It is by implication an assumption that there is evidence on the point. There can be no doubt of the soundness of the "wholesome and just principle" invoked by the plaintiff. "Fraud and collusion is never presumed, but must be proved, either expressly, or *by necessary consequence from the acts done.*" Lord Hardwick in *Aston* vs. *Aston*, 1 Ves., Sr. 268.

"It must be clearly proved by the party making the charge; for the presumption is always against bad faith." *Stewart* vs. *English*, 6 Ind., 179; *Nichols* vs. *Patten*, 18 Me., 239; *Blaisdell* vs. *Cowell*, 14 Id. 370; *Coulson* vs. *Coulson*, 5 Wis., 79. In the case last cited this language is used: "Aside from

the unsupported charges of fraud in the bill, there is nothing in the case to impeach, in any respect, the regularity and fairness of all the proceedings." (Id. 81.) Substituting for the words, "Charges of fraud in the bill," the words *suggestions of fraud in the charge*, and we have the case raised by the plaintiff's exceptions. The thing to be expunged from the record by the fraud which was insinuated, was the written application of the defendant for the conversion of one bank into another, and her endorsement in writing of the checks, received by her as a stockholder. To, in effect, set aside a written instrument on the ground of fraud, "the evidence thereof must be clear, precise and indisputable, and of that which occurred at the execution of the instrument. *Cummins* vs. *Hurlbert*, 92 Pa., St. 162." While a court can in some cases properly infer fraud from certain facts found, yet it is constructive and legal, as distinguished from actual fraud, and the inference is one of law, and not of fact." *Brady* vs. *Bairnes*, 42 Conn., 512. The court cannot infer additional facts from the facts found.

The court in this part of the charge, as in the instructions heretofore adverted to, committed the error, so often reprehended by this tribunal, of charging a jury "upon a supposed or conjectural state of facts of which no evidence has been offered." TANEY, *C. J.*, in *U. S.* vs. *Breitling*, 20 How., 254; *Bank* vs. *Eldred*, 9 Wall., 544; the error of giving an instruction, "purporting to be based upon facts in the case, when there is no evidence of such facts." *Hamilton* vs. *Singer, &c., Co.*, 54 Ill., 370; *Oxley* vs. *Stover*, Id., 161; "a hypothetical charge which is entirely unsupported by any evidence in the case."

Hewitt vs. *Bregole*, 22 Mich., 31. It is appropriate to adopt here the language of the court in *McLean* vs. *Clark*: "Doubtless the counsel may have pressed such a thought in argument to the jury, *but it was not for the court to press it home by its charge, since there was nothing in the evidence to justify it. The judge should, on the contrary, if counsel did so argue, have warned the jury, that they were to determine the case from the evidence.*" (47 Ga., 70.)

II.

"When the law requires a public declaration of the amount of the capital upon which a corporation operates, it contemplates a truthful statement in which the general public dealing with the corporation may confide. The certificate is made for the benefit of the public, not for the corporation or its stockholders. Those who participated in the incorporation of this bank, and by a certificate made in pursuance of the statute, announced the amount of its capital stock, can not, as against the creditors of the corporation, contradict their own certificate."—*Thompson* vs. *Lake*, 19 New, 111.

"Is he (a shareholder) to go on as long as they pay dividends, and then after they cease to pay dividends to inquire whether it is a fraudulent transaction or not? Observe what this would lead to. Persons would buy shares in every company they found paying high dividends; would carefully avoid making any inquiry as long as they paid those high dividends; would go on receiving those high dividends as long as they paid them, and the moment they failed to do so, would turn round and say, I repudiate the whole transaction. It is impossible, in my opinion, that the court can come to such a conclusion as that." Master of the Rolls in *Leatherdale's case*, 2 Solicitor's Journal and Rep., 1039; 3 Id., p. 2.

A rule, no less of morals than of law, imposes silence on a party who seeks to contradict previous statements, upon the faith of which others have dealt. *White* vs. *Brolaw*, 14 Ohio St., 348; *Beardsley* vs. *Foot*, Id. 416; *Bank* vs. *Hazard*, 30 N. Y. 226; *Kirk* vs. *Hartman*, 63 Pa. St., 106; *Coleman* vs. *Pearce*; *McClellan* vs. *Kennedy*, 8 Md., 230; *Fitts* vs. *Brown*, 20 N. H., 293; *Bigelow* vs. *Foss*, 59 Me., 164; *Cornish* vs. *Abingdon*, H. & N. 555; *Blair* vs. *Wait*, 69 N. Y., 113; 26 Mum., 126.

The doctrine of estoppel *in pais* or of equitable estoppel is supported by an unbroken series of decisions from the days of Vernon and of Salkeld down to the present time. *Bigelow* vs. *Foss*, 59 Me., 164.

As between the comptroller and the defendant this doctrine is of very obvious application. The action of the Comptroller was the immediate result of the representations made to him. We have the declaration made by a party, whose duty it was to know and state the truth, which was relied on by one, who had no other means of information, and who was justified in relying upon such declaration. *Hambleton & Co.* vs. *Central, &c., Co.*, 42 Md., 552. The action of the party seeking to enforce the estoppel has been influenced, in consequence of his reliance upon the representations made, and influenced to the detriment of those, in whose interest the estoppel is now exacted. *Day* vs. *Calon*, 119 Mass., 519; *Preston* vs. *Am. Linen Co.*, Id., 400.

Married women may be estopped by their deliberate conduct, as well as any one else. *Norton* vs. *Nichols*, 35 Mich., 148; *Godfrey* vs. *Thornton*, 46 Wis., 690; *Sharpe* vs. *Foy*, 4 Ch. Ap. (Law Rep.)

35. *In Re Lush's Trusts*, Id. 591. "To be silent when good faith and common honesty required her to speak and now ask to be protected from liability because she had not previously and formally authorized her husband to make the contract, would be a fraud which we are unwilling to sanction. *We think the true rule in such cases is when a a married woman permits her husband to use and control her property, she must see that his acts are within the powers given him, in order that frauds may not be practiced upon others.* *Bergen* vs. *Keiser*, 17 Ill. App., 508.

The defendant is the wife of the president of this bank. Her own husband (who was also her admitted agent), has therefore repeatedly sworn, as required by law, (R. S., 5210, 5211), that she was a stockholder to the extent claimed in this controversy; and at least three of the directors, on each occasion, have corroborated his statement. The Comptoller of the Currency, and through his medium, the creditors of the bank, confided in the truth of this solemn asseveration, and the stock book which sustained it.

"As a stockholder she was an integral part of the corporation. * * If they (the stockholders) choose to rest supine until cases against them like this on trial, they must take the consequences. * * This court has applied the same rule to an order made by the comptroller of the currency, under the 50th section of the National Bank Act, appointing a receiver, and directing him to proceed to make collections from the stockholders of an insolvent bank." *Sanger* vs. *Upton*, 91 U. S., 59.

This was an action by the assignee of the Great Western Insurance Company of Chicago, against Mrs. Sanger, (Rec., p. 32,) for her unpaid subscrip-

tion; when the certificates of the stock were given to her in blank, as they were issued, her name never appearing in the certificates, nor the books of the company (Id.); and where her counsel objected to the introduction of papers purporting to be applications for increase of capital stock, signed by the directors and stockholders, her own among the latter, on the ground that the names above were not signed py the parties, purported to have signed. Id. 17.

But, said this Court:

"No one else claimed it (the stock). The certificates were issued and delivered to her. They belonged to her. They were the muniment of her title. She could have filled the blanks with her name whenever she thought proper. She had paid to the company all that was then payable, and subsequently received a dividend. Her name was placed upon the stock list. These facts was conclusive against her. She was estopped from denying her ownership. She could not assert her title if there were a profit, and deny it if there were a loss." 91 U. S., 63, cited and approved in *Hawkins* vs. *Glenn*, 131 U. S., 329.

When no objection is interposed, save that of present forgetfulness of facts, not otherwise impugned, a defendant should not be permitted, while admitting her signature to papers, to repudiate their contents.

If, in any case, a defendant may forget himself, or herself, out of liability, ascertained by writing, and especially if parol forgetfulness, years after an event, can be successful in defeating the effect of cotemporaneous writing, the principles underlying the statute of frauds, and the statute of limitations are solecisms.

Where the facts constituting membership are admitted, it is no rebuttal to deny that the legal consequence ensues. The defendant cannot admit the premises, and in the same breath deny the consequence. She might as well undertake to admit the facts which constitute marriage, at the same time insist that she was single. It is the law which determines the conclusion and not the wish, the opinion, or the memory of the witness. The defendant might naturally discharge her memory of that with which her husband, as her agent, was expressly charged.

III.

At the close of the plaintiff's case there was a general objection made and exception taken by the defendant to the reading to the jury "of each and every of the transfers, books, certificates, papers, paper writings, and documents," which, during the progress of the trial, had been offered in evidence by the plaintiff. (Rec., p. 23.) But no specific objection was at any time made to the admission of any portion of this testimony, nor was the attention of the trial court directed, at any time, to any ground, upon which such objection could be sustained.

It is only necessary to set out in a bill of exceptions so much of the evidence as conduces to establish a fact upon which a principle of law is raised. *Wallace* vs. *Boston*, 10 Mo., 660.

It might be asserted, with reasonable confidence, that the evidence admitted in the plaintiff's behalf was unassailable and unexceptionable; but even if, after the lapse of six years, the ingenuity of counsel

could now suggest objections, which could have been made at the trial, they would not be heard. Such an objection and exception is too general to authorize this court to review any questions which might arise if specific objection had been made and overruled, *Wheeler* vs. *Billings*, 38 N. Y., 263, *Newell* vs. *Doty*, 33 Id., 83; *Wait* vs. *Maxwell*, 5 Pick., 219. The admission of evidence to which no objection was made known at the time is not ground for objection afterwards. *Ross* vs. *Reid*, 1 Wheat., 482; *Suydam* vs. *Williamson*, 20 How., 427; *Ins. Co.*, vs. *Larner*, 95 U. S., 171.

A party who objects to the admission of evidence offered should state his reasons to the court, at the time, or the objection will be considered as waived. *Peoriase Co.* vs. *Neil*, 16 Ill., 269. "*The court was not bound to search out objections that might possibly exist, and if not pointed out this court ought to regard them as waived.*" (Id., 271.) "The presumption that the writing was introduced upon proper preliminary proof, must be overcome by the record. But nothing of the kind is found therein." *Courtright* vs. *Deeds*, 37 Iowa, 509.

It is presumptive evidence that one is a stockholder, when his name appears on the books of the company. *Hoagland* vs. *Bell*, 36 Barb., 57; *Turnbull* vs. *Payson*, 95 U. S., 418; *Pittsburgh*, &c., *Co.* vs. *Applegate*, 21 W. Va., 172; *McHose* vs. *Wheeler*, 45 Pa. St., 32; *Whitman* vs. *Proprietor*, &c., 24 Me., 236; *Bank* vs. *Burr*, Id., 256.

The books of a corporation are the regular evidence of their doings. *Coffin* vs. *Collins*, 17 Me., 442; *Owings* vs. *Speed*, 5 Wheat., 420: "Where the

name of an individual appears on the stock-book of a corporation as a stockholder, the *prima facie* presumption is that he is the owner of the stock. (*Turnbull* vs. *Payson*, 95 U. S., 421. "And in an action against him as a stockholder, the burthen of proving that he is not a stockholder is thrown upon him." (36 Barb., 57; 95 U. S., 421.)

"The receipt of a dividend upon the shares standing upon the books of the company in the name of the defendant, when taken in connection with the other evidence is conclusive." (Id., *Irons* vs. *Bank*, 17 Fed. Rep., 315. With but little modification the exact language of the case last cited may be applied. "The proof in the case, as to the names of the shareholders, and the shares held by each, consists of the stock ledger, and stubbs of the stock certificates, and the dividend sheets of the bank, and they all show the number of shares on which they respectively drew the last dividends. This certainly is *prima facie* proof that the defendants were stockholders, and of the number of shares they held, and unless rebutted is sufficient to sustain the allegations of the bill." (Id.) Hence, in ordering an assessment for the payment of the debts of an insolvent bank the stock certificates and stock ledger of the bank must be taken by the Comptroller of the Currency in the absence of fraud or mistake, as showing who the stockholders were at the time of failure. *Davis* vs. *Essex Baptist Society*, 44 Conn., 582. But no fraud, nor semblance of fraud, was any where manifested in the proof.

Thus, in the General Term, objection was made, which may possibly be repeated here, that it does not appear than any new stock-book was opened, or

new certificates of stock issued in the name of the German-American National Bank, but the books of the Savings Bank were transferred to the National Bank. But there is nothing in the law prescribing the form of stock-book, or of the certificates, and nothing to prevent the new bank from treating the old books and certificates as sufficient evidence of title in the new. Neither the rights nor the liabilities of the stockholders could be affected by the mere omission to issue a new form of stock certificate to them. To hold otherwise would be to allow all the stockholders to escape liability by the mere omission of the formality of issuing the shares in a new form.

"The registry of the stockholder's name upon the stock-book of the company, opposite the number of his shares, gives him his title." *New Albany, &c., Co.* vs. *McCormick*, 10 Ind., 499.

By appearing on the stock-book of the bank, and upon the list of shareholders required to be posted in the business room of the bank, they assumed the liability of shareholders. *Moore* vs. *Jones*, 3 Woods, C. Ct., 55.

It is not essential that certificates of stock shall issue at all. *Chester Glass Co.* vs. *Dewy*, 16 Mass., 94; *Burr* vs. *Wilcox*, 22 N. Y., 551. Without a certificate the shareholder has a complete power to transfer his stock. *Bank* vs. *Gifford*, 47 Iowa, 575; *National Bank* vs. *Watsontown Bank*, 103 U. S., 217; to receive dividends, *Ellis* vs. *Proprietors, &c.*, 2 Pick., 243; and he is undeniably liable as a stockholder, *Bank* vs. *Wilson*, 24 Me., 273; *Mitchell* vs. *Beckman*, 64 Cal., 117.

IV.

The defendant did indeed specially plead, (but not until after issue joined) that that there never was such a National Banking Association as the German-American National Bank. (Rec., p. 7.) By R. S., § 515, it is enacted that any bank incorporated by special laws or organized under a general law of any State, may, by authority of said act, become a national association, &c. It is claimed that the Savings Bank was incorporated under a general incorporation act, applicable only to the District of Columbia. But by act of Congress of June 30th, 1876, it was enacted that "all savings banks, or other banks now organized, or which shall hereafter be organized in the District of Columbia, under any act of Congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes and of all acts of Congress applicable to national banking associations, so far as the same may be applicable to such savings or other banks; provided that such savings banks now established shall not be required to have a paid-up capital exceeding $100,000."

It might well be held that this act of itself converted the Savings Bank into a National Bank, as undoubtedly it engrafted upon its charter the individual liability of shareholders. The steps, however, for the due incorporation of the Savings Bank as a National Bank, were all taken (Rec., pp. 12, 13, 14, 15, 16, 17, 18), and as this Court has decided the certificate of the Comptroller is conclusive as to the regularity of the proceedings by which that conversion was effected. *Casey* vs. *Galli*, 94 U. S., 673.

It is equally well settled that such a plea is in abatement and not in bar (Id.); and also that "Where a shareholder is called upon to respond to a liability as such, or where a party has contracted with a corporation and is sued upon the contract, neither is permitted to deny the existence or legal validity of the corporation; to hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent in its effects and consequences should be as if it were real, and the law properly so regards it." (Id.) *Hadley* vs. *Baker*, 20 Wall., 650; *Wheelock* vs. *Rost*, 77 Ill., 296; *Huffaker* vs. *Bank*, 12 Bush., 287; *McBrown* vs. *Lebanon*, 31 Ind., 309; *Voorhees* vs. *Receivers*, 19 Ohio, 463. One who gives a note to a corporation is estopped to deny that there is such a corporation. *Nashua Fire Ins. Co.* vs. *Moore*, 55 N. H., 48.

In addition the plea itself being in abatement was a nullity when interposed after a plea in bar. *Palmer* vs. *Green*, 1 Johns Case, 101; *Bernham* vs. *Webster*, 5 Mass., 268; *Shepard* vs. *Graves*, 14 How., 510; *Good Intent Co.* vs. *Hartzell*, 10 Harris, 285.

V.

The pleadings disclose that the defendant has interposed the plea; "that she is now and has ever since the 15th day of August, 1856, been the wife of John

Hitz, *i.e.* the wife of the president of the bank, in which she is a stockholder (Rec., p. 4). To this the plaintiff replied that the stock "by reason of the ownership of which the defendant became liable in the sum of money assessed by the Comptroller of the Currency against her and sued for herein, was at the time of the failure of said bank and continued to be the property of the defendant, owned by her in her own right, with the consent and permission of her husband." Upon the trial of this issue, the judgment of the court below was in favor of the plaintiff. This issue having been thus decided is necessarily not submitted in any of the exceptions, or assignments of error, now before the court, and it may be that nothing more is required to be said. It is, however, safer to act on the contrary assumption, and in this view the following is submitted in justification of the general term.

Even at common law, a married woman may take by purchase, unless her husband expressly dissents, (Co., Litt. 3 a). S. P. *Baxter* v. *Smith*, 6 Binney, 429. A husband might at common law, make to his wife a gift of a chattel. *Clough* v. *Russell*, 55 N. H., 282.

But, in equity, it is familiar doctrine that a husband and wife may contract with, and convey to each other, *Slanning* vs. *Style*, 3 P. Wms., 338; *Lucas* v. *Lucas*, 1 Atts., 270; *Hannan* v. *Oxley*, 23 Wis., 521; *Cooke* v. *Husbands*, 11 Md., 492; *Chew* v. *Beall*, 13 id., 349. *Lloyd* v. *Pugh*, L. R. 14, Eq. 241; *Goner* v. *Owings*, 16 Md., 91; *Gill* v. *Woods*, 81 Ill., 64; *Wood* v. *Wood*, 83 N. Y., 575. A husband may convey all his real estate directly to his wife, and if the same be not in fraud of creditors it is good.

Sayers v. *Wall*, 26 Gratt., 354; *Horder* v. *Horder*, 23 Kansas, 391; *Wood* v. *Broadley*, 76 Mo., 23; *Majors* v. *Everton*, 89 Ill., 56; *Thompson* v. *Allen*, 101 Pa. St., 44.

Neither a legacy to a wife, nor a distributive share in an estate in which she is interested vests in the husband absolutely. *Wildman* v. *Wildman*, 9 Ves., 77. And where such distributive share is denoted by a transfer of stock into the name of the wife, such transfer does not vest the property in the husband, but does vest a chose in action in the wife, id; *Parsons* v. *Parsons*, 9 N. H., 309. He may decline to reduce into possession by an act sufficient to complete the title in the wife. *Drury* v. *Biscoe*, 42 Md., 162; *George* v. *Cutting*, 46 N. H., 131; *Standevord* v. *Devol*, 21 Ind., 404. *Bent* v. *Bent*, 44 Vt., 555; *Barron* v. *Barron*, 24id., 375; *Jaycox* v. *Caldwell*, 37 How., Pr., 240; *Stahe* v. *Reigert*, 1 Gill., 1.

A husband may relinquish to his wife the rents and profits of the realty of which he is tenant by the curtesy, in which case they will vest in her free from any control by him. *Hay* v. *Parks*, 39 Conn., 357. He can waive his right as husband and permit his wife to retain her money. *Bryant* v. *Bryant*, 3 Bush., 155.

If a husband make a gift of a promissory note to his wife, she may maintain an action on it against the maker. *Tullis* vs. *Fidley*, 9 Minn., 79.

A wife may buy a promissory note from her husband and his endorsement will convey it to her as an endorsee. *Wilson* vs. *Wilson*, 113 Ind., 415.

If a husband deposit money in a Savings Bank in his wife's name, and she draw checks against it, he cannot reclaim it, nor the bank deny its liability.

People vs. *State*, 36 Hun.,607. Or if he has the bank book therefor made in her name and delivered to her. *Sweeney* vs. *Savings Bank*,116 Mass., 384.

It is well settled that a husband may allow his wife to take her own savings and appropriate them to her separate use. *Quindest* vs. *Pergeaux*, 3 Green's R., 412; *State* vs. *Fulton*, 30 N. J. L., 440, *Peterson* vs *Milford*, 36 id. 489.

A husband vests an interest in shares of bank stock in his wife, by causing them to be transferred into her name on the books of the bank, or by procuring them to be directly transferred by the person from whom he purchased them, into her name, there being no creditors, and no fraud upon any person. *Demming* vs. *Williams*, 26 Conn., 226.

The mere transfer by the husband of £1,000 South Sea securities is so decisive an act as to amount to an agreement by the husband that the property hould become her's. *Lucas* vs. *Lucas*, 1 Atk., 270, *Walker* vs. *Hodge*, 2 Swanst., 108.

Where the husband himself makes a gift or grant to the wife, the intention to relinquish his own rights in favor of his wife, and thus give her a separate property or interest is necessarily, and most clearly and unequivocally manifested and declared. *Whitten* vs. *Whitten*, 3 Cush., 199. Such is the conclusion of law whenever the husband transfers stock or other personal property to the wife. *Hill* vs. *Pine*, &c. *Bank*, 45 N. H., 308; *McMillan* vs. *Peacock*, 57 Ala. 130.

The husband cannot retake the property surrendered by him. *Bent* vs. *Bent*, 44 V., 55. It is not in his power to revoke his gift after it has been executed. *Raymond* vs. *Pritchard*, 24 Ind., 318; *Deming* vs. *Williams*, 26 Conn., 230.

In respect to separate property thus derived, the wife is competent to act in all respects as if she were a *feme sole*. She may give or pledge or sell it, or make any other bargain with respect to it with any person in the same manner as if she were an unmarried moman; she may give or sell it to her husband. *Powell* vs. *Powell*, 9 Humph., 480; *Peacock* vs. *Monk*, 2 Ves Sr., 190; *Helm* vs. *Tenant*, 1 B. C. C., 19; *Pitt* vs. *Jackson*, Id., 51; *Harris* vs. *Harris*, 9 Ired. Eq., 114; *Piquet* vs. *Swan*, 4 Mason, 444.

Upon the death of the wife seized of personal estate, thus acquired, it goes to her representatives. *Underhill* vs. *Morgan*, 33 Conn., 109, and if she die intestate, it passes to her admistrator as part of her estate. *Jennings* vs. *Davis*, 31 id 134.

Hence, except as against creditors, a gift of personal property by a husband to his wife is valid without the aid of the married woman's acts. *Kelley* vs. *Campbell*, 2 Abb. App. Dec. 492. These acts (of 1848 and 1849) *for the more effectual protection of the property of married women*," were not intended to curtail, but to enlarge existing rights. *Lockwood* vs. *Cullin*, 4 Robt. 129. After the New York statutes of 1848 and 1849 and independently of C, 90, 1860, a married woman might acquire the title to real and personal property by buying the same upon credit, and no indebtedness therein would pas to her husband, *whether she had antecedently any separate estate or not*. *Knapp* vs. *Smith*, 27 N. C., 277. Once acquired, "*she would be entitled to hold them to her sole and separate use in the same manner as though she were not under the disabilities of Coverture*. Denio, J. id 280. "After the husband had delivered the prop-

erty to her, she would hold it by a *strictly legal title*, as she held her other separate property." *Savage* vs *O'Neil*, 42 N. Y. 302; *Caldwell* vs. *Renfrow*, 33 Vt., 213.

"Now, however, as a married woman may hold property as a *feme sole*, the trustee can safely convey to her the legal title." *Wilbur* vs. *Frandenburgh* 52, Barb. 478; *Spring* vs. *Haight*, 22 Me. 408; *Warren* vs. *Brown*, 25 Miss. 66; *Gill vs. Woods*, 81 Ill., 64.

The rule as to the unity of the husband and wife "was one of technicality and not of substance." *Bordeno vs. Ampere*, 14 Mich. 95.

"It appears, therefore, that the law did not prohibit a husband from accomplishing for his wife the precise thing which he would have accomplished by a direct conveyance, and and it would seem from this that the rule was one of technicality and not of substance. *Burdeno vs Ampere* 14, Mich. 15-16-17.

The technical reasons of the common law arising from the unity of husband and wife, which would prevent his conveying the property directly to her, have long since ceased to operate in the case of his voluntary transfer of it as a settlement upon her. Jones vs. *Clifton*, 101 U. S. 225; *Moore* vs. *Page*, 111 Id. 117. In *Jackson* vs. *Jackson* (appeal from the Supreme Court of the District of Columbia), this court said: "*It was competent and lawful for the husband to allow the wife to invest the money which she had at her marriage, and her subseqaent earnings for her own use, so as to be beyond his reach and control.*" 91 U. S. 124.

The statutes "defining the rights of women in the marriage relation in respect to the ownership, con-

trol, and disposition of property have, in effect, done away with the technical unity of husband and wife, as formally existing at common law." *May* vs. *May*, 9 Neb. 22.

By the instruments executed to the defendant the legal title to the stock was transferred to her. *Leitch* vs. *Wells*, 48 N. Y. 605–607. *The certificate is evidence of its absolute ownership by her*, Id.

In the absence of anything prohibitory in the corporation deed or charter, there was never any reason why a married women could not become a stockholder, and, in consequence, liable to contribute to make good a deficit of corporation assets. Mrs. Matthewman's case. L. R., 3 Eq. 781.

In the case of *Butler* vs. *Cumpton*, it was urged that the disability arising from coverture, protected a married woman from the binding obligation of that contract, and from all libality incident thereto. But, said the court, "the contract to take the eleven shares is a contract by this married women, not only to take the shares but to bear all the burthen, at the sametime that she had all the advantages of taking the shares, and with that must necessarily follow the obligation to pay all future calls." L. R. 7 Eq. 21.

In *Luard's case*, the shares had continued standing in the name of the wife, *the dividends upon them having been paid to the husband by the wife's order, up to the time the bank stopped payment.* Mrs. Luard, it was said, never executed the deed of settlement of the Company, or any instrument by which she came under any liability in respect of the shares. But, said the court, *Mrs. Luard received the dividends upon the shares, and having thus taken the ben-*

efit of the deed she could not in equity be permitted to repudiate it. 1 DeG. F. and J., 544.

The right of a married woman to hold bank stock is a common law right. *Denning* vs. *Williams*, 26 Conn. 227; *Adams* vs. *Bracket*, 5 Metc.(Mass.), 280; *Stanwood* vs. *Stanwood*, 17 Mass., 52.

The right to hold National Bank stock is necessarily derived from the general terms in which the right to subscribe is given to all persons. The liability to assessment inexorably follows.

But the question whether a married woman is liable under an act of this nature was settled prior to the National Bank act. The question came up for decision, under ch. 226, p. 155, Vol. IV, New York Rev. St., which enacts:

Whenever default shall be made in the payment of any debt or liability, contracted after the 1st day of January, 1850, by corporation, or joint stock association for banking purposes, issuing, &c., the stockholders of such corporation or association shall be individually responsible equally and ratably, &c., to the extent of their respective shares of stock.

This act was the model of the National Bank Act, and the latter may well be considered to have intended to incorporate the received construction with the identical language of the former.

It was insisted that, under the New York statute, a married woman was not liable to be assessed in respect to her stock to pay the creditors of the bank—an argument which came with greater force then than now, if, as might well have happened, such married woman had acquired her stock, when no such burden was annexed to it, or could lawfully be exacted.

The court said: "The legislature, if it had thought proper to do so might have made an exception in favor of married women, but no such exception was made. * * It was competent for the legislature to depart from the rules and analogies of the common law, and to make married women and their estates liable in this proceeding, as other shareholders in banks are made liable. This, we think, has been done, and it seems to us proper to add that we see no reason why it ought not to have been done, in order to effectuate the policy in which the constitutional provision and the statute are founded. *It might go far to defeat that policy, if married women could take and hold stock without liability to creditors.*" *In re Reciprocity Bank*, 22 N. Y., 15. In another decision of the same question, the court said: "The answer to the various objections of the married women who were stockholders at the time of the failure of the bank is to be found in the plain terms of the act. The liability thereby created is imposed upon the "stockholders." *Married women could own stock in their own right, both at common law and under the act of* 1848, *and the acts amending it.*" 29 Barb., 382; How. Pr., 323. This case is cited with approval by the Supreme Court of Rhode Island in a case presenting the same question. The court (Durfee, *C. J.*) said: "One of the defendants was a married woman, and was such when she became a stockholder. She demurs denying her liability on the ground that the liability is predicated on contract, and being a married woman she was incapable of contracting. We do not think this view is tenable. The liability is a statutory liability, and as

such is incident to the ownership of stock. If a married woman is capable of becoming a stockholder, which is not questioned, she becomes subject to the liability by force of the statute, not by contract, when she becomes a stockholder." *Sayles* vs. *Bates*, 15 R. I., 347.

In the myriad corporations now existing, and which heretofore have existed in this country, married women are and have been stockholders, and the stock of any one of them may be transferred to married women. When the law imposes, upon this existing capacity to hold stock, the individual liability for it, the law necessarily empowers the contract, which by necessary intendment and implication, the law imposes as an annexation to the stock. The law does not impose an obligation and at the same time withhold the power to respond to it.

If, then, there were no other authority to be adduced save decisions under similar statutes, and the inexorable logic of the situation, in the absence of conflicting decisions, these influences should be controlling. The question, however, has been decided in questions arising under the National Bank act.

In *Anderson, Receiver*, vs. *Line and wife*, the court directed a verdict for the plaintiff, reserving the following point: "Whether the defendant, Mary S. Line, having been a married woman at the time the shares of the capital stock of the First National Bank of Allentown were transferred to her, and ever since, was, notwithstanding her coverture, capable of engaging in the undertaking averred, and liable as a shareholder in the said bank in the manner and form in which she is sought to be charged." The

defendant's stock had been transferred to her by her husband. On April 28th, 1880, the Court said:

"*The Court being of opinion that her coverture does not exempt her from the liability imposed by the National Currency acts upon all stockholders in National banks*, therefore decide the question reserved against the defendant, and in favor of the plaintiff, and order judgment to be entered on the verdict in favor of the plaintiff." 14 Fed. Rep., 405. The opinion of the Court is that "a married woman who owns stock in a National bank is not exempt on account of her coverture, from the liability imposed by the National currency acts upon *all stockholders* in such banks." Id.

In *Hobart, Receiver* vs. *Johnson*, the Comptroller of the Currency had made an assessment of 100 per cent. on the par value of the shares of a National bank in New Jersey. The receiver of the bank sued the defendant, a married woman, to collect the assessment on shares owned by her. She set up as a defence that when sued she was a married woman; *that she bought the shares through her agent while she was a married woman, and that the certificate therefor was delivered to her agent.* A New Jersey was Statute excepted a married woman from liability as an accommodation indorser, guarantor, or surety, or any liability to pay the debt or default of another person.

It was contended for the defendant that the liability created by the act of Congress was in the nature of a liability of securityship, and that the suit was one to enforce a promise to pay the debt of another. But the court (BLATCHFORD, J.) said: "This view does not appear to be tenable. The contract

made by the shareholder is entered into in the act of becoming a shareholder. Every creditor of the bank, becoming such, becomes *eo instanti*, a creditor of the shareholder, in respect to the liability in question. * * *It must be assumed either that the defendant had a separate estate, or contracted with a view to create, by owning the stock, a separate estate. In either view, the contract was for her benefit as the holder of a separate estate. Under such circumstances, by way of estoppel, she will not be allowed to claim and enjoy, as regards the bank and creditors and her co-stockholders, the benefit of her position, as a shareholder, and then repudiate the statutory obligation attached to it.*" 19 Blatchf. 362. So far as the acquisition of a separate estate is concerned, the opinion last cited is in keeping with that of this court in *Sykes* vs. *Chadwick*, where an action at law by a married woman was maintained on a promissory note, given to her by the defendant, who had purchased her dower interest in the real estate of her husband, who also signed the note, as maker. The court held that this note constituted her separate estate, *and that by the Act of* 1869, *she acquired the capacity at law to receive property to her separate use, and that she was relieved from the incapacity the common law imposed upon, and was, as if she were unmarried in respect to it.* 18 Wall 141.

In a more recent case, the Circuit Court uses this language: "This married woman appears upon these books and cases to be personally holden for this assessment, if she is in fact a shareholder. Sound reasoning appears to lead to the same conclusion, for the statute declaring the liability, makes no dis-

tinc tion or exception, except to those holding the stock, as executors, administrators, and guardians, and that exception has no application to this case. * * The conclusion follows that under the laws of the United States, and of this State, this married woman is the shareholder of these shares, and as such became responsible for the debts of the bank, for which this assessment is wanted, and by the action of the comptroller became personally liable for this assessment." *Witters* vs. *Sowles*, 32 Fed. Rep., 768.

The case seems still harder when the stock comes to a married woman as legatee, yet, in such a case, where the estate of the testator had been transferred to devisees or legatees, and could not be subjected to liabilities of the bank accruing after the transfer, and where on the representations of the executor that he had more than sufficient assets in his hands to satisfy all debts and legacies, he was decreed to pay S. S. (a married woman) her legacy, but neglected to do so, until after the failure of the National bank, in which the testator was a stockholder. Held that, under R. S. U. S. 5151 and 5152, the legatee and her trustee were chargable with an assessment upon testator's stock to meet the liabilities of the bank accruing before actual delivery to the legatee. *Witters, Receiver* vs. *Sowles*, 32 Fed. Rep., 130.

In the court below, in this very case, it was said :

"The larger part of the Savings Bank stock was transferred to the defendant immediately by her husband. *We see no difficulty in the way of the husband's making this transfer so as to vest the legal title to his wife. With his assent, she might acquire*

title by purchase from strangers, and except where it interferes with the rights of strangers, there is no reason why he may not transfer the legal title to any of his property into her name, except that at common law a conveyance of realty could not be made directly from him to her. He, however, may have his shares of stock cancelled and new ones issued to the wife and her title will be the same as if they were derived from a stranger." *Keyser* vs. *Hitz*, 2 Mackey, 492.

VI.

It only remains to be considered whether the meritorious cause of action being against the wife, and the wife only, her husband should, as mere matter of form, be joined with her.

In general, when a liability is imposed by statute, and an adequate remedy given by the same statute, parties availing themselves of the statute to enforce the right or liability are confined to the statutory redress. There is a right here to enforce the individual liability of a particular stockholder, against that stockholder, and against no other person whatever. Either the defendant is liable, or nobody is liable, on account of the assessment upon her stock. If her husband were made co-defendant with her, judgment could not be entered, and execution could not issue against him. It were not only supererogatory but improper to make one defendant in an action against whom judgment and execution could not be obtained. It would have to be averred in the declaration that the contract imposed by law upon every shareholder was extended to the shareholder's husband. If a joint judgment obtained and entered against both, were deemed, in the sequel, er-

roneous to one, it would have to be reversed *in to to*. It may well be doubted whether it would be competent to join both husband and wife, and ask a general judgment against both. *Valentine & Lloyd*, 4 Abb. Pr., U. S., 371.

Thus, where, under the law, a husband is exempt from liability for the debts of the wife contracted before marriage, the wife may be sued alone, and her estate alone is liable. *Maddox* vs. *Gilmer*, 40 Ala., 637; *Bossic* vs. *Love*, 16 Cal., 69; *Melches* vs. *Kirkland*, 22 Id., 522. So where the husband has no interest in a right of action accruing to the wife, he cannot be joined with her therein. *Mussleman* vs. *Gallagher & wife*, 32 Iowa, 383.

But in any event the non-joinder of the husband would be matter for a plea in abatement only, and by a failure to interpose such plea the objection is waived. *Dalton* vs. *M. C. R. R. Co.*, 76 E. C. L., 474; *Benedix* vs. *Wakeman*, 12 M. & W., 97; 1 D. & L., 450; *Milner* vs. *Milner*, 3 T. R., (Dunn & East), 627; *Morgan* vs. *Arbitt*, 3 Exch., 611; *Evans* vs. *Chester*, 2 M. & W., 847; *Moses* vs. *Richardson*, 8 B. & C., 421; *Gayard* vs. *Sutton*, 54 E. C. L., 153; *Young* vs. *Ward*, 21 Ill., 225.

Finally: "Where no material facts are in dispute and the case in point of law is clearly with one party or the other, the highest obligation of judicial duty requires a charge to that effect." *Koons* vs. *Steele*, 19 Pa. St., 203. A charge in conformity with this principle would exactly reverse that of the trial court. The charge of the trial judge was, in effect, a determination of the case in favor of a defendant who had admitted the plaintiff's cause of action. He

should have charged the jury as in "*Sanger* vs. *Upton*," that "if they believed the testimony, the defendant was liable," 91 U. S. 63.

All the facts being before the appellate tribunal, final judgment in favor of the plaintiff may properly be directed. *Ringo* vs. *Richardson*, 53 Mo., 385; *Brown* vs. *Bank*, 5 Mo., App. 1.

The transfer of the stock to the defendant is proved by the records of the bank, and such record is not impeached, nor its integrity denied.

LEIGH ROBINSON,
Attorney for Plaintiff.

Office Supreme Court U. S.
FILED,
OCT 21 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term 1889.

BENJ. U. KEYSER, *Receiver*, &c.,
Pl'ff in Error,

vs.

JANE C. HITZ.

No. 42.

Brief for Defendant in Error.

ENOCH TOTTEN,
Attorney for Defendant in Error.

R. O. Polkinhorn, Printer.

Supreme Court of the United States.

October Term 1889.

BENJ. U. KEYSER, *Receiver*, &c.,
Pl'ff in Error,

vs.

JANE C. HITZ.

No. 42.

Brief for Defendant in Error.

This action is based upon the alleged liability of the defendant, as shareholder in the institution known as the German American National Bank, of this city, which failed on the 30th day of October, 1878.

The declaration sets out the organization of the bank "under the laws of the United States," its failure, and the appointment of the plaintiff as receiver; that the defendant, at the time of the failure of the bank, "held, or owned, two hundred (200) shares of the stock of said banking association," of the par value of $20,000, upon which she was liable, under sec. 5151 of the R. S.; that, on the 11th of June, 1880, an assessment, or call, was made by the Comptroller of the Currency, of which due notice was given, and that the defendant has not paid the assessment.

The defendant interposed four pleas, to the following effect:

1. That she was never indebted as alleged;

2. That she never either held or owned, at any time, any stock whatsoever in said bank, and that if it appear on the books of said bank that she is or was a stockholder, such entries to that extent are fraudulent;

3. That she is, and since Aug. 5, 1856, has been, the wife of John Hitz, residing in this District;

4. That there is not now, and never has been, such a corporation as the German American National Bank; she also denies that the plaintiff is or ever was the legally appointed receiver of such corporation.

The plaintiff joined issue upon the first and second pleas, and demurred to the third plea (of coverture); this demurrer being overruled, he replied that the stock sued upon "was, at the time of the failure of said bank, and continued to be, property of the defendant, *owned by her in her own right*, with the consent and permission of her husband."

To this replication the defendant rejoined, denying that the said stock was owned by her, in her own right, with the consent of her husband or otherwise.

The case was tried before a jury early in 1883, and resulted in a verdict for the defendant by direction of the court. On a motion for a new trial in general term on a bill of exceptions the judgment was reversed and the cause remanded. (See 2 Mackey, 473.) The trial court (MacArthur, J.,) on the first

trial directed a verdict for the plaintiff on the ground that Mrs. Hitz, being a married woman, could not be held in this action, no proof being offered to show that the stock was any part of her separate estate.

In the court in General Term two questions were made and decided. It was urged in behalf of the defendant (1) that the attempted transformation of the German American *Savings* Bank into the German American *National* Bank was not authorized by law and was therefore void; and (2) that defendant being a married woman, and no proof being offered to show that the stock constituted any part of her separate estate, she could not be held liable for the assessments. Both of these propositions were resolved by the General Term against the defendant, and the cause was remanded for a new trial. The second trial also resulted in a verdict in favor of the defendant. On appeal to the General Term the last judgment was affirmed and the plaintiff sued out this writ of error.

Statement of Facts.

On the 24th of September, 1872, the German American Savings Bank was organized by filing a certificate of incorporation in the office of the recorder of deeds of this District. This organization proceeded under the authority of the general incorporation act of the District (16 Stat. 153; R. S. D. C. § 553,) and the 2d section of the act of Congress of June 17, 1870, (16 stat., 153). The capital stock was fixed at $50,000.00 divided into five hundred shares of $100 each.

On the 21st of January, 1876, four transfers of the stock of this Savings Bank were made, apparently transferring to Mrs. Hitz 200 shares of the stock. One of these transfers (of 173 shares) was made by her husband John Hitz (10); one of 10 shares was made by W. F. Mattingly, or in his name by his brother; one of 10 shares was made by R. B. Donaldson and the fourth of seven shares was made by C. E. Prentiss, (11). At the time of this transaction Hitz was President, Donaldson was Vice-President, Prentiss was Cashier, and Mattingly was one of the "Trustees" of the Savings Bank, (30). Mrs. Hitz, the defendant, was not consulted about this transfer; she did not consent to it; she would not have consented to it had she been consulted, and not one cent of consideration was ever paid by or to anybody for the stock. Mrs. Hitz never knew anything about the transaction until after the failure of the German-American National Bank. Neither Hitz nor Prentiss was called as a witness. Both Mattingly and Donaldson were called by the defendant, and they testified that they did not own the stock purporting to have been transferred by them, and never sold it to Mrs. Hitz, and that they never received any pay for it. Neither of them knew that the stock was in his name. Mattingly personally did not sign the transfers: his name was signed to the assignment by his brother. Donaldson signed his transfer. There was no proof offered to show whether the signatures of Hitz and Prentiss to these certificates were genuine. It appears (18) that certificates for this stock of the savings bank were filled up in the name of Mrs. Hitz, but they were not delivered to her, and she never saw any of them until after the national bank

had been closed, (31). There is nothing in the evidence to show what disposition was made of the certificates.

No part of the capital stock of the National Bank, *eo nomine*, was ever issued or charged to Mrs. Hitz, and no attempt was ever made to issue such stock to her. In reference to that stock, no certificates were ever made to her. The evidence offered to prove that this defendant was a shareholder in the *National* Bank consisted of the several undelivered assignments, (11), to the defendant found in the book of "Stock Transfers and Ledger" of the German American *Savings* Bank, and the "stubs" of certificates, showing the cancellation of the certificates covered by the transfers, and those showing the issue of other certificates in lieu of those cancelled (11,21). It is a conceded fact that no part of the capital stock of the National Bank, appeared on the books of that bank in the name of the defendant. It is sought to hold her because of the records of the savings bank above mentioned.

Another circumstance, much relied upon by the plaintiff to establish the alleged ownership of stock, was, that prior to the supposed conversion of the Savings Bank into a National Bank three checks were issued for semi-annual dividends on the Savings' Bank Stock which had been so charged against the name of Mrs. Hitz. These checks were dated respectively on May 1, 1876, Nov. 1, 1876, and May 1, 1877, (19,321,) and were drawn in favor of Mrs. Hitz; they were produced by the plaintiff on the trial, and the name of the defendant, as indorser in blank, appeared on each check followed by that of her husband as "Consul General;" and the proof showed

(22, 32) that he collected them on the day of the date of each, and on the same day in each instance placed the proceeds to his own credit in his account as "Consul General" in the Savings Bank. Mr. and Mrs. Hitz, at that date, resided at the corner of 6th street and Pennsylvania avenue S. E., in this city (10, 11, 30). This evidence is relied upon as proof of her consent to, or her ratification of, the transfer of the stock to her.

These three checks were offered and received in evidence without any proof whatsoever of the genuineness of the endorsement of Mrs. H., notwithstanding objections made by the counsel for the defendant.

On the 7th day of May, 1877, an application was made to the Comptroller of the Currency by certain stockholders of the German-American Savings Bank, asking that the *Savings* Bank be converted into a *National* Banking Association to be called the German-American National Bank, (12). A paper purporting to be the original of this document (12) was produced in court, and was offered and received in evidence on the trial without any proof of the genuineness of any of the signatures appearing thereon, notwithstanding the counsel for the defendant objected. (23.) The name of Mrs. Hitz appears on this paper as one of the stockholders joining in the application.

The German-American National Bank closed its doors on the 30th day of October, 1878, and on that day, or the next, the plaintiff took possession (22); on the 1st day of November, 1878, he was appointed receiver of the institution by the Comptroller of the Currency. (10.) An assessment was made upon the

stockholders, and the defendant was called upon to pay $20,000.00 with interest. (2.) She refused to pay, and this action followed. The amount of this assessment is over $30,000.00.

Points and Authorities.

The defendant defends against this action, in its present condition, on the following grounds, to wit:

1. There is no error in the record of which the plaintiff has a right to complain;

2. The transfer on the books of the Savings Bank of $20,000.00 (200 shares) of the stock of the Savings Bank, on the 21st day of January, 1876, was without her knowledge, authority or consent, was without consideration and was fraudulent and void;

3. She never was a shareholder in the National Banking Association in question, and no stock therein was ever issued or charged to her on the books of the Association, nor was there any certificate therefor issued or delivered to her.

4. At the time of the alleged transfer of Savings Bank stock to her on said books she was a married woman, and the transfer was by and from her husband, and was without consideration and was fraudulent and void.

5. That the attempted conversion (May 14, 1877,) of the German American *Savings* Bank into the German-American *National* Bank, was not authorized by law, and was void.

The first exception taken by counsel for the plaintiff on the trial, is based upon two questions

propounded to the defendant, who was a witness in his own behalf. The questions were intended to elicit from the witness an opinion touching the power or tenacity of her own memory. The inquiries were not improper in view of the character and peculiarities of the case, and even if they might have been justly subjected to criticism on the trial, the trial court was the exclusive judge as to the propriety of taking the answer. Error cannot be assigned in discretionary matters of this kind.

The second exception is founded upon the following prayer granted, on the request of counsel for the defendant, to wit:

> "If the jury shall be satisfied from the evidence that the stock involved in this controversy was transferred upon the books of the German-American Savings Bank to and in the name of the defendant, without her knowledge and consent, the verdict shall be for the defendant, unless they shall further find that she subsequently and knowingly ratified and confirmed such transfer." (34).

This prayer seems to be unobjectionable and will hardly be seriously assailed here. The prayers which form the basis of the fifth and sixth exceptions (36) are akin to this, but omit the qualification as to the alleged subsequent confirmation by the defendant of the transfer of stock. But the court, after giving these two instructions to the jury, immediately explained and modified them fully as much as the rights of the defendant warranted. The court in the general charge instructed the jury (40) on this point in these words:

"I dictated an instruction because I was not entirely satisfied with the way in which the principle of law sought to be invoked was expressed. My instruction was to the effect that if it shall appear to the satisfaction of the jury that Mrs. Hitz never purchased this stock, either directly or indirectly, that is, by herself or agent, that she knew nothing about it, she would not be responsible as a shareholder for an assessment of this kind. *That is to be taken, of course, in connection with what I said about a ratification, and if you come to the conclusion that Mrs. Hitz ratified this, although she did not make the purchase originally upon a fair understanding of the circumstances of the case, the verdict must be against her.* If, on the other hand, she has not ratified it, and knew nothing about it, nothing could be more unjust than to hold her responsible for the face value of the stock which she never owned, and never purchased, and knew nothing about. In that case she would be entitled to a verdict."

In addition to this the court told the jury, in the general instructions (38), that the alleged acts of the defendant in endorsing the checks and signing the application asking that the Savings Bank be converted into a National Bank, "ordinarily would be sufficient to establish the relation of the party to the bank *as a shareholder*." And in another place (39) the court told the jury that those acts "certainly would be a very strong circumstance to prove a ratification" of the transfer to her of the stock. This language was very strong in the interest of the plaintiff.

In this connection the court further instructed the jury in the following language, to wit:

"Another view of the case is presented by the instruction which is sought on the part of the

defendant, that these acts did not amount to a ratification of the transfer of this stock, unless she was aware of the circumstance that the stock stood in her name; and I think that that is a correct proposition. The inference, of course, would be that she understood, and must have understood, that if she signed those instruments deliberately, the stock was in her name or some portion of the stock. But, on the other hand, is her positive testimony that she knew nothing about it. And it is contended on the part of Mrs. Hitz that those signatures, if genuine, were obtained from her by some piece of management that prevents them amounting to a ratification; because, if the signatures were obtained from her by fraud or by misrepresentation, it would not amount to a ratification. In order, in other words, for an act to amount to a ratification, the person must understand the act they are about executing, and its reference to the main fact which is sought to be corroborated."

It is not probable that the jury was misled by these instructions. They were left free to determine whether or not Mrs. Hitz fairly ratified the clandestine transfer of stock to her.

The element of fraud is alluded to in the prayer found in the fifth exception (36), and it has been urged by the counsel for the plaintiff that there is no proof of fraud in the case to warrant this allusion. But it may well be replied that in a case where $20,000.00 in bank stock has been transferred without consideration and secretly, the most natural suggestion to ordinary minds is that such transfer was made for "fraudulent purposes." That the transfer was made by and at the suggestion of the husband there can be no doubt; $17,300.00 of the amount

was transferred by him directly. He was president of the bank. Mattingly was a trustee, and Donaldson was vice-president, but both were inactive officers of the bank. Neither of them knew anything of this transfer, so made in their names, and neither of them owned any part of the stock by them so transferred to Mrs. Hitz, nor did they receive any pay for it from anybody.

These undisputed facts, without more, were surely sufficient to suggest fraud, and fraud, too, on the part of Hitz. But lest this suggestion of fraud in the prayer might mislead the jury, the court immediately afterwards, and at the request of the plaintiff's counsel, instructed the jury in writing, as follows: "Fraud must be affirmatively and positively proved, and cannot be found by conjecture in the absence of such affirmative proof." (37). This language was as strong as the law authorizes. Not content with this very forcible statement the court further instructed the jury on this point, as follows:

> "Now, it is very properly claimed on the part of the receiver, that fraud is a fact that is not to be inferred, or conjectured, but must be proved. Well, that is a wholesome and just principle of law. And when it is claimed that these signatures were obtained from Mrs. Hitz fraudulently and as a part of the fraud which was perpetrated in her name from the outset, it must be proved. This does not mean that the proof of fraud is to be direct and positive; because fraud can scarcely be ever proved by direct and positive testimony; but it means this: that like any other fact or circumstance, it may be proved by other circumstances that produce a moral impression that fraud has been committed. In other words, it may be proved by circum-

stantial testimony. If the circumstances in the case indicate fraud, that fulfills the requirement of the law 'that fraud must be proved.'"

Fraud was satisfactorily proven.

At all events there is an abundance of evidence of fraud in the record to sustain this verdict. Hitz was the President of this bank and in a position to know. The transfer was to the defendant without her knowledge or consent. This is an uncontradicted fact. No proof was offered by the plaintiff to show that she had any knowledge of the business. Although Hitz, or Hitz and Prentiss together, must have known every fact and circumstance connected with the transaction. Neither of them was called to the witness stand to testify. If she knew of the transfer or authorized it, they must have known it. The certificates of the stock were neither given nor exhibited to her. She was never invited to and never did vote upon the stock, either in the Savings Bank or the National Bank, notwithstanding the fact that the stock stood in her name on the books of the Savings Bank for nearly three years. The elections of the Savings Bank were by law required to be held annually as in National Banks. The defendant did not vote on this stock in either organization, nor was there any evidence that any "proxy" was ever signed by her in reference to the stock. Had such "proxy" ever been made it would undoubtedly have been produced or accounted for by the plaintiff. The blank certificates filled up in her name, as shown by the stubs, were neither produced nor accounted for, although one or more of them was shown to the defendant at her dwelling house after the bank failed.

The money paid for dividends while the Savings Bank existed never went to her. Hitz received it. No checks were ever made to her for dividends during the race of the National Bank. It is a singular circumstance that each of those checks was issued, endorsed and collected and the proceeds placed to the credit of Hitz on the day of its date in each instance. It will be remembered that Mrs. Hitz resided at the corner of 6th St. and Penn. Ave., S. E.; how was her signature procured upon the back of each of these checks, so promptly? Were they sent to her house? If they were she could hardly fail to have noticed the character of the checks and the messenger who carried the checks to Mrs. H., if they were ever presented to her, would have been a witness whom the plaintiff should naturally seek. Was her name written for her inside the book? There was no proof of the genuineness of these signatures; her own statement that the signatures resembled her's is all the proof which was heard in the case on this subject. The very prompt collection of these several checks by the husband is a very suspicious fact, and should naturally attract the attention of the jury.

Personal liability on the Savings Bank stock was the same as on stock of the National Bank. (R. S., D. C., § 574.)

These are significant circumstances, and show very satisfactorily that the object of the husband was to fraudulently escape liability by reason of the ownership of the stock by secretly transferring the stock to the name of his wife. The transfers were made in 1876, and the concern collapsed in 1878. It is a fair inference, in the absence of proof by the plaintiff to the contrary, that the embarrassments of the

institution had been felt by its president, and that his apprehensions of approaching disaster had been excited. If this was not the state of affairs, and the Savings Bank was then solvent upon fair valuations of the assets held by it, the means of showing this to the jury were in the hands of the plaintiff. He made no such proof.

THE PLAINTIFF, ON THE PROOF, WAS NOT ENTITLED TO RECOVER.

The trial was conducted from the outset on the theory that papers and documents found in the Treasury of the United States or in the hands of the receiver of this bank required neither proof nor authentication. The first paper offered and given in evidence was that showing the appointment of the plaintiff as receiver, (10). No proof of genuineness was offered and it was not authenticated as the law requires. The same is true of the alleged transfers of stock made by Hitz, Mattingly and Prentiss; the assignment made for Mattingly shows on its face that it was not made by him in person. The application of the stockholders asking for a conversion of the Savings Bank into a National Bank was said to be the original paper from the files of the office of the Comptroller of the currency (12); it was in no way authenticated, and there was no word of proof as to the genuineness of any of the signatures appearing upon it. The original was not shown to Mrs. Hitz, on the trial (31); a photograph copy was shown her. Counsel for the defendant objected to the introduction in evidence of this "original" document at the time (12, 23) but his objection was over-

ruled (23). The same is true as to the "articles of association" (13). As before stated the genuineness of the signature of Mrs. Hitz, on the back of the dividend checks was not proved. The list of the stockholders of the bank (27–28), is subject to the same objections; it was admitted over objections in the same way.

Motion to Strike Paper out of Record.

There is no proof in the record to show that the the Comptroller of the currency ever consented to the organization of this National Bank.

By a special plea the defendant denied the corporate existence of the German American *National* Bank, which plea was put in issue, (7).

The court will find in the printed transcript of the record (15) a "certificate of organization," but it does not appear from the record that it was offered in evidence and it is not authenticated by the certificate of the proper officer of the Treasury as required by law. There never has been such an officer as an "*Acting* Comptroller of the Currency;" there was, and is now, a "*Deputy* Comptroller of the Currency." (R. S. Sec. 327.) Such a certificate could not have been received as evidence to prove the organization of the bank. (R. S. Secs. 884, 885). This certificate is essential to the conversion of a State bank into a National bank. (R. S., § 5154).

In the bill of exceptions in this case as settled by counsel and signed and sealed by the court and made of record this paper is not found. It was inserted in the transcript sent here with the writ of error by

an assistant of the clerk of the court below through a misapprehension. (See his aff. with motion papers).

A motion was submitted to the trial judge to amend the bills of exception by including therein this organization certificate, which motion was "allowed" by the judge; but this was after the trial court had adjourned without day, and after the cause had been for a long time pending in the general term on appeal. The bill of exceptions was filed Dec. 5, 1883. (Mo. papers, p. 9). The circuit court adjourned *sine die*, January 24, 1884 (Mo. papers p. 10) and this motion was submitted to Judge McArthur on the 25 of March, 1884, and allowed by him on the same day. On the next day March 26, 1884, the hearing of the cause began in the general term. (p. 10). This order was therefore a nullity, and the defendant in error is entitled to have the paper struck out of the record of this cause, in accordance with her motion for that purpose, on file.

The foregoing observations are perhaps sufficient; but two other questions were involved in the case, and were much discussed in the court below. One of these referred to the power to hold a married woman responsible for such assessments where she had paid no consideration for the stock, and where it did not in any way appertain to her separate estate. The other related to the powers under the public law (R. S., Sec. 5154), to convert a *Savings* into a *National* Bank in the District of Columbia. A few suggestions on these two questions may not be out of place.

THE DEFENDANT WAS A MARRIED WOMAN AND CANNOT BE HELD LIABLE FOR THIS ASSESSMENT.

The trial judge, at the first trial, following the rule apparently laid down by the general term of the court below, in *Ritch* vs. *Hyatt*, (3 MacArthur, 538), held that the defendant was not liable. But this doctrine was not sanctioned in the general term in this cause, (2 Mackay, 473), and the judgment was reversed.

A reference to some of the facts is proper here. At least $17,300.00 of the stock was transferred to the defendant by her husband. The whole probably was owned by him and was transferred by him to her name to subserve some secret purpose of his own. He himself, probably, kept possessionof the certificates, and voted upon the stock and he took good care to collect all the dividends. The transfer was wholly without consideration. Under these circumstances she cannot be held either according to the common law or by virtue of the act of Congress called the "married woman's act." If she can be held at all, it must be by virtue of the provisions of this local statute.

This law of the District, as to married women, being the act of April 10, 1869, is as follows:

> "In the District the right of married women to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage *in any other way than by gift or conveyance from her husband*, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor be liable for his debts.

"Any married woman may convey, devise, and bequeath her property, or any interest therein, in the same manner and with like effect as if she were unmarried.

"Any married woman *may contract*, sue, and be sued, in her own name, *in all matters having relation to her sole and separate property*, in the same manner as if she were unmarried." (R. S., Dis. of Columbia, Secs. 727–8–9.)

It is needless to discuss the question whether or not the defendant would have been liable for this assessment had she purchased the stock with funds appertaining to her separate estate, or if the proof had shown that she possessed a separate estate, and her husband or her agent had invested her separate fund in the stock. No such question is presented here.

The undisputed evidence in the case shows that no consideration whatsoever passed from the defendant, or from anybody for her, for this stock. If the transaction had been with her knowledge and consent it could amount to no more than a "gift" or a "conveyance," without consideration from her husband. Such a transaction is not authorized by this statute. *Sykes* vs. *Chadwick*, 18 Wall., 141.

The Act of June, 1864 (the National Currency Act), did not change, but was made in contemplation of, the common law. The Married Woman's Act, in force in this District, was approved and became a law April 10, 1869, long after the Currency Act, and hence must be held to govern. This local statute fixes the rights and liabilities of married women.

This court at the last term approved this doctrine.

Bundy vs. *Cocke*, 128, U. S., 185;

See *Drury* vs. *Foster*, 2 Wall., 24;

Bank vs. *Rice*, 4 How., 225;
Wither vs. *Sowles*, 32 Fed. R., 764;
Felter vs. *Newhall*, 21 Blatch., 445;
Lorillard vs. *Oil Co.*, 18 Blatch., 199.

The cases are abundant to show that merely formal or fraudulent transfers of the stock of National Banks will be disregarded, and the true owner held on his statutory liability. Hitz was clearly the owner of this stock.

See *National Bank* vs. *Case*, 99 U. S., 62;
Bowden vs. *Johnson*, 107 U. S., 251;
Davis vs. *Stevens*, 17 Blatchf., 259;
See also *Anderson* vs. *Warehouse Co.*, 111 U. S., 479.

The fact, which is undisputed, that the husband, in each instance, collected and appropriated to his own use the proceeds of the dividend checks, is a strong circumstance towards proving that the stock was his, and not the property of his wife.

The proof shows that the certificates made out in the name of the defendant were not delivered to her nor brought to her attention. The ordinary and effectual way of transferring this kind of stock is by endorsement and delivery of the certificate. When the owner endorses and delivers the certificates for consideration, the title passes to the purchaser.

Bank vs. *Lanier*, 11 Wall., 369;
Johnson vs. *Laflin*, 103 U. S., 800;
See also *Whitney* vs. *Butler*, 118 U. S., 655.

Even if the defendant actually endorsed the dividend checks and signed the application for conver-

sion, she did so in total ignorance of the nature of the papers, and is not estopped. This doctrine was strongly enforced in *Cammack* vs. *Lewis*, 15 Wall., 643.

If the transaction at the outset was not binding upon the defendant, because she was a married woman, and had no reference to her separate estate, no subsequent acts of her's, such as are relied upon here, could render the transfer valid.

THE ATTEMPTED CONVERSION OF THE SAVINGS INTO A NATIONAL BANK WAS UNWARRANTED BY LAW, AND VOID.

The power to create a corporation is a part of the *sovereign power* of the State (Field on Corps., 17, Sec. 11). Congress has power to provide for the creation of corporations by general laws (*Ibid.*, 20, 22), and by the National Currency Act has authorized the creation of corporations for banking business by an association of persons who proceed under the supervision of the Comptroller of the Currency, and in pursuance of certain prescribed rules and regulations. The Comptroller of the Currency cannot initiate any such proceedings, nor can he approve of the acts of others done with the view of creating such corporations, unless the requirements of the statute are reasonably complied with; he can issue the final certificate or proclamation of incorporation only after the preliminary steps have been taken regularly by others. If he possesses no power to effect the conversion of the German American *Savings* Bank into the German-American *National*

Bank, and thus change the whole situation of affairs, and the relative responsibility of the parties interested, his acts are void, as well as to those preceding as to those following the failure of the bank. There was no power known to the law which could or can appoint a receiver of a Savings-bank in this District, except the power of the court. Unless the Comptroller was clothed with power to accomplish this conversion in the manner shown in the record, it follows that the attempted appointment of a *receiver* was an encroachment upon the chancery jurisdiction of the court.

The following statutes are relied upon for the authority to convert this Savings-bank into a National banking association.

The forty-fourth Section of the National Currency Act, now forming Section 5154 of the Revised Statutes, provides as follows:

> "*Be it further enacted*, That any bank incorporated by special law, or any banking institution organized under a general law of any State, may, by authority of this act, become a National Association under its provisions, by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate required by this act may be executed by a majority of the directors of the bank or banking institution; and said certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and to change or convert the said bank or banking institution into a National Association under this act. And a majority of the directors, after executing said articles of association and organization certificate, shall have power to execute all other papers,

and to do whatever may be required to make its organization perfect and complete as a National Association. The shares of any such bank may continue to be for the same amount each as they were before said conversion, and the directors aforesaid may be the directors of the association until others are elected or appointed in accordance with the provisions of this act; and any State bank which is a stockholder in any other bank, by authority of State laws, may continue to hold its stock; although either bank, or both, may be organized under and have accepted the provisions of this act. *When the Comptroller shall give to such association a certificate, under his hand and official seal, that the provisions of this act have been complied with, and that it is authorized to commence the business of banking under it, the association shall have the same powers and privileges, and shall be subject to the same duties, responsibilities and rules, in all respects as are prescribed in this act for other associations organized under it, and shall be held and regarded as an association under this act: Provided, however*, That no such association shall have a less capital than the amount prescribed for banking associations under this act." (13 Stat.)

Section Sixth, of the Act of Congress, of June 30, 1876, provides as follows:

"That all Savings Banks, or Savings and Trust companies, organized under authority of any Act of Congress, shall be and are hereby, required to make to the Comptroller of the Currency, and publish all the reports which National-Banking associations are required to make and publish under the provisions of section fifty-two hundred and thirteen of the Revised Statutes, and shall be subject to the same penalties for failure to make or publish such reports as are therein pro-

vided ; which penalties may be collected by suit before any court of the United States in the district in which the said Savings Banks, or Savings and Trust Companies, may be located. And all *Savings or other Banks* now organized, or shall hereafter be organized, in the District of Columbia, under any Act of Congress, which shall have capital stock paid up in whole or in part, *shall be subject to all the provisions of the Revised Statutes, and of all Acts of Congress applicable to National Banking Associations, so far as the same may be applicable to such Savings or Banks: Provided*, That such SAVINGS BANKS now established, shall not be required to have a paid-up capital exceeding one hundred thousand dollars. (19 Stat., 64; Richardson, 218.)

The general incorporation law in this District contains the following sections:

"Any three or more persons who may desire to form a company for the purpose of carrying on any kind of manufacturing, agricultural, mining, mechanical business, insurance, mercantile, transportation, or marketing in the District of Columbia, may make, sign, and acknowledge, before some officer competent to take the acknowledgement of deeds, and file in the office of the Register of Deeds a certificate in writing, in which shall be stated the corporate name of said company and the objects for which said company shall be formed; the amount of the capital stock of said company; the term of its existence, not to exceed twenty years; the number of shares of which the said stock shall consist; the number of trustees and their names, who shall manage the concerns of said company for the first year; the name of the place in said District in which the operations of said company are to be carried on." (R. S. D. C., § 553; 16 Stat., 153.)

"SEC. 559. The trustees shall have power to make such prudential by-laws as they deem proper for the management and disposal of the stock and business affairs of said company, not inconsistent with the laws of the District and Constitution of the United States, and prescribing the duties of officers, artificers, and servants that may be employed, for the appointment of all officers, and for carrying on all kinds of business within the objects and purposes of such company

"SEC. 574. The stockholders of any company organized under the provisions of this chapter shall jointly, severally, and individually be liable for all debts that may be due and owing to all their laborers, servants, and apprentices, for services performed for such corporation, and shall be individually liable for all debts of said corporation to the amount of the stock of each stockholder.

"AN ACT EXEMPTING FROM TAXES CERTAIN PROPERTY IN THE DISTRICT OF COLUMBIA, AND TO AMEND THE 'ACT TO PROVIDE FOR THE CREATION OF CORPORATIONS IN THE DISTRICT OF COLUMBIA BY GENERAL LAW.'" *Approved June* 17, 1870.

SECTION 2. *And be it further enacted*, That Savings Banks may be organized within the District of Columbia under the provisions of section four of an act "to provide for the creation of corporations in the District of Columbia by general law," and the limitation of twenty years provided for in said section for the existence of corporations created under and by virtue of the provisions of said section shall not apply to corporations formed only for the purposes of life insurance.

(R. S. D. C., § 553, 16 Stat.)

The forty-fourth section of the Act of June, 1864, the original law establishing the National Bank system, applies only to "banks incorporated by *special law*" of any State, or "any banking institutions organized under a *general law*" of a State. It cannot be successfully argued that these terms can include "Savings Banks" in this District, organized in pursuance of the authority and powers of the general law of Congress, governing the organization of such institutions in the District of Columbia. This latter act was passed May 5, 1870, and was made to include Savings Banks June 17th, 1870, and about six years after the National Currency Act went into operation; this German-American Savings Bank was organized September 24th, 1872.

The authority produced on the trial by the plaintiff for the creation of this *National* Bank, consisted of a document, dated May 7, 1877, purporting to be signed by stockholders of the *Savings*-bank, empowering the trustees thereof to convert it into a national bank, "under the sections of the revised statutes, which authorize the conversion of *State Banks* into National associations" (Sec. 5154), and "to make and execute the articles of association and organization certificate required to be or contemplated by said statutes;" and to execute all papers, and do all acts necessary to be done "to convert said German-American Savings Bank into a National Banking association," and to transfer the assets to the proposed national bank, &c., &c (11).

There was no evidence that anything beyond this was done, except that "articles of association" were made and signed by the trustees May 7, 1876. (13).

No authority for this extraordinary assumption of power can be derived from the act of June 30th, 1876, even if its requirements had been followed. The most that can be drawn from that act, in this direction, must come from the concluding provisions and language of the sixth section; these declare that *Savings'* banks or *other* banks in this District "shall be subject to all the provisions of the revised statutes and of all acts of Congress applicable to National banking associations, *so far as the same may be applicable to such Savings or other banks.*" (See as to "Savings Banks," *Huntington* vs. *Bank*, 16 U. S., 388; 32 Conn., 173; 43 Conn., 155). It is submitted that no change in the character of these institutions was here contemplated;—the acts of Congress mentioned are to govern, so far as the terms thereof may be "applicable" to such institutions, and no farther; those parts of the acts which may be inapplicable to "*Savings*" banks or to that system, shall not apply. This is the plain interpretation of the statutes. Instead of contemplating the dissolution or destruction of Savings banks, the legislation clearly intended their preservation and protection, as well as to guard the interests of depositors. The only operation of the law of 1876, requiring reports and examinations, was to give to the Comptroller of the Currency a general supervising power and guardianship over them. If Congress by the Act of 1876 intended to place the Savings Banks of the District of Columbia on the same footing as that of State Banks under section 5154, it would have said so directly.

The general statute authorizing the creation of "Savings banks" and other corporations in the Dis-

trict of Columbia (R. S. D. C., § 553), provides that upon making and filing the certificate prescribed by the act, the persons "shall be body politic and corporate in fact and in name;" may sue and be sued; have perpetual succession; have a seal; adopt rules and regulations; purchase, hold and convey real and personal estate necessary to carry out its "operations named in" the certificate, &c., &c.

National Banks (R. S., 5133) are authorized by law (R. S., Sec. 5133), to "carry on the business of banking." The law requires that the certificate shall state the town, the place where the operation of "*discount and deposit*" shall be carried on, the amount of capital stock and the number of shares. The "business of banking," as defined in (R. S., Sec. 5136 and 7), to consist in discounting and negotiating notes, drafts, bills, and other evidences of debt, receiving deposits, buying and selling exchange, coin and bullion, loaning money on "personal security," circulating its notes, &c., &c. They are forbidden by law to lend money on *real estate*, or to hold real estate as security, except for previously contracted debts (§ 5137.)

A "Savings Bank', and a National Bank, as will be seen from the case of *Huntington* vs. *Bank*, are entirely distinct things. One is wholly commercial and the other is eleemosynary, or *quasi* eleemosynary. This Court in that case uses the following language in relation to a "Saving Bank":

> "Its purpose is rather to furnish a safe depository for the money of those members of the community disposed to intrust their property to its keeping. It is somewhat of the nature of such corporations as church-wardens for the

> conservation of the goods of a parish, the college of surgeons for the promotion of medical science, or the society of antiquaries for the advancement of the study of antiquities. Its purpose is a public advantage, without any interest in its members." (96 U. S., 394.)

The two systems of business are wholly different, and are intended to subserve entirely different objects and ends. These considerations, it should seem, establish the correctness of the interpretation of the sixth section of the Act of 1876, contended for by the defendant—that is to say, that those provisions were to affect Savings Banks only so far as they were applicable to the "savings" principle.

Applying to this transaction the familiar rules, which apply as well to corporations as to public officers, that no powers will be presumed except those which follow necessarily from the general grant of power, it will be difficult to find any statutory authority for the existence of this National Bank. (See *Morrill* vs *Jones*, 106 U. S., 466.)

It is submitted that the judgment ought to be affirmed.

ENOCH TOTTEN,
For defendant in error.

Supreme Court of the United States,

OCTOBER TERM, 1889.

BENJ. U. KEYSER, Receiver,
Plaintiff in Error,

vs.

JANE C. HITZ.

No. 42.

MOTION TO STRIKE OUT PART OF TRANSCRIPT AND ACCOMPANYING PAPERS (THREE AFFIDAVITS AND ONE CERTIFICATE.)

And now comes the said defendant in error and moves the court to strike out of the bill of exceptions found in the transcript of the record returned in this cause with the writ of error by the clerk of the Supreme Court of the District of Columbia, the copy of a certificate dated March 14th, 1877, appearing on page 15 of the printed record in the cause, and purporting to be a copy of the certificate of the organization of the German-American National Bank, mentioned in said record, and purporting to be signed by J. S. Longworthy, *Acting* Comptroller of the Currency, and for reasons assigns the following, to wit:

First. Said document is not now and never was a part of, or incorporated into, the said original bill of exceptions;

Second. Said document was never filed amongst the papers on file in said cause in the Supreme Court of the District of Columbia;

Third. The clerk of the Supreme Court of the District of Columbia unlawfully, improperly and without authority, incorporated the said document in the copy of the said bill of exceptions sent up with said transcript.

ENOCH TOTTEN,
Atty. for Deft. in Error.

SUPREME COURT OF THE UNITED STATES.
October Term, 1889.

BENJ. U. KEYSER, Receiver,
Plaintiff in Error,
vs.
JANE C. HITZ. } No. 42.

AFFIDAVIT OF JANE C. HITZ, IN SUPPORT OF MOTION TO STRIKE OUT IMPROPER PART OF RECORD.

COUNTY OF HANCOCK, }
State of Maine. } *ss.:*

S. B. THURLOW,
Notary Public.

[SEAL.]

Be it remembered that on this third day of July, 1889, at my office, in the State and county aforesaid, appeared Jane C. Hitz, who, being by me first duly sworn, did depose and say that she is the defendant in error in the above-entitled cause, and that she is a resident of the District of Columbia, but is temporarily sojourning in the county and State afore-

said; that she is informed and believes that the document found on page 15 of the printed record of this cause purporting to be a copy of the certificate of organization issued by the Acting Comptroller of the Currency, dated on the 14th day of March, 1877, signed J. S. Langworthy, Acting Comptroller of the Currency, is not in the original bill of exceptions as settled by counsel in the trial court, filed therein on the 5th day of December, 1883, and signed and sealed by the trial judge who presided at the said trial of said cause; that said document was, as she is advised by counsel, improperly inserted in the transcript sent to this court with the writ of error in this cause; that she is further informed and believes, and therefore alleges, that long after the term of the Circuit Court at which the said trial of said cause was had, had been finally adjourned without day, and long after the appeal of the plaintiff (in said Circuit Court) had been taken to and was pending for hearing on the trial calendar of the General Term of the Supreme Court of the District of Columbia on the said original bill of exceptions, and after the said General Term had been engaged in the trial of causes on said trial calender a written motion was, on the 25th day of March, 1884, presented to the justice who had presided at the trial of said cause, and who had long before that time adjourned the said Circuit Court *sine die*, asking said trial justice to amend said bill of exceptions, by inserting said document in the original bill, of exceptions, and that said trial justice, then and there, after the term was ended as aforesaid, and on the same day said motion was presented to him, to wit, on the 25th day of March, 1884, endorsed on said motion the following words and figures, to wit: "Allowed. March 25, 1884. McArthur, Justice"; but the said document was never actually inserted in or attached to the said original bill of exceptions; that the affiant had no previous notice of such application or motion, and she is informed and believes that no notice thereof was given to her counsel in the cause; affiant is ad-

vised by counsel, and submits to the court, that said allowance of said motion and said attempt to alter and amend the said bill of exceptions was without the authority of law and beyond the power of said trial justice, and that all of said acts are wholly null and void; that the said Circuit Court at which said cause was tried was adjourned *sine die* on the 29th day of January, 1884, as will appear by a certified copy of the order to that effect herewith filed, and that the term of the General Term of said court at which said cause was heard and decided convened at the time appointed therefor according to law, to wit, on the first day of October, 1883, and that said cause was argued in said General Term on the 26th and 27th days of March, 1884, and was about the 23rd day of December, 1884, decided.

JANE C. HITZ.

Subscribed and sworn to before [me,] in the county and State aforesaid, the 3d day of July, 1889.

S. B. THURLOW,
Notary Public.

[SEAL.]

SUPREME COURT OF THE UNITED STATES.

October Term, 1889.

BENJ. U. KEYSER, Receiver,
Plaintiff in Error,
vs.
JANE C. HITZ.
} No. 42.

DISTRICT OF COLUMBIA, } *ss:*

L. P. Williams, being first duly sworn, deposes and says that he is now, and ever since the 1st day of August, 1884, has been an assistant clerk of the Supreme Court of the District of Columbia, and that he is the same L. P. Williams who, as assistant clerk of said Court authenticated the transcript of the record sent up from the said Supreme Court of

the District of Columbia to the Supreme Court of the United States in the above cause. That the document on page 15 of the printed record in said cause purporting to be a copy of the certificate of the organization of the German American National Bank, mentioned in said record, was not attached thereto, inserted in, and did not form a part of the original bill of exceptions settled and signed and sealed by the justice who presided at the trial of said cause, and now on file and making of record the alleged errors of law occurring on the trial of said cause, and the exceptions based thereon, but the said document, as affiant supposed, was by an order of the said presiding justice afterwards, and on the 25th day of March, 1884, made a part of said bill of exceptions, in the following manner, to wit:

On the 25th of March, 1884, counsel for the plaintiff presented to the said trial justice a motion in the words and figures following, to wit:

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BENJAMIN U. KEYSER, Receiver, &c.
vs.
JANE C. HITZ. } Law, No. 22,261.

(Filed March 25, 1884.—R. J. MEIGS, Clerk.)

Now comes the plaintiff and moves the court to amend the bills of exceptions in the above entitled cause, by including in the evidence therein stated, the certificate of organization of the Comptroller of the Currency, improperly and accidentally omitted from said bills of exceptions, but which was offered and admitted in evidence at the trial of the cause, as will appear from the affidavit of Mr. R. Ross Perry filed in support hereof.

ELLIOT & ROBINSON,
for Plaintiff.

That the said motion was supported by an affidavit in the words and figures following, to wit:

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BENJAMIN U. KEYSER, Receiver, etc. } Law,
vs. } No. 22,261.
JANE C. HITZ.

(Filed March 25, 1884 —R. J. MEIGS, Clerk.)

R. Ross Perry, having been duly sworn. deposes and says:

My name is R. Ross Perry; I am of lawful age, and am a member of the bar of the above entitled court. I recollect that at the trial of the case of Keyser *vs.* Hitz, numbered as above, which trial appears from the record to have taken place on or about the 21st day of November, 1883. I was in the Circuit Court room where the said trial was proceeding. I heard Mr. Leigh Robinson, of counsel in said case, offer and read in evidence a paper writing purporting to be a certified copy or original of the certificate of organization of the German American National Bank of the District of Columbia.

R. ROSS PERRY.

Sworn to before me, March 12, 1884.

R. J. MEIGS, *Clerk.*
By J. R. YOUNG, *Asst. Clerk.*

And that on the day of filing and presenting the said motion and affidavit, the said trial justice endorsed on said motion the words and figures following, to wit:

"Allowed March 25, 1884.

"MACARTHUR, *Justice.*"

In consequence of the said allowance of said motion, affiant, when he prepared the said transcript, inserted, where it now appears, the said copy of the certificate in the copy of the bill of exceptions, prepared with and forming part of said transcript. The

said certificate so inserted was not actually attached in any way to the said original bill of exceptions. The said certificate or document does not appear amongst the papers on file in said cause, and does not appear to have been filed in said cause, but was produced, and it was represented to me as the paper so allowed by Justice Arthur Mac Arthur, and upon that representation, I made it part of the record.

LEANDER P. WILLIAMS.

Subscribed and sworn to before me, this 5th day of July, 1889.

[SEAL.]

R. J. MEIGS, *Clerk.*
By J. R. YOUNG, *Asst. Clerk.*

SUPREME COURT OF THE UNITED STATES.

October Term 1889.

BENJ. U. KEYSER, Receiver,
Plaintiff in Error,
vs.
JANE C. HITZ. } No. 42.

DISTRICT OF COLUMBIA, } *ss:*

William A. McKenney, being by me first duly sworn, deposes and says, that he is now, and for a long time has been, a member of the bar of the Supreme Court of the District of Columbia, and is now and for a long time has been practicing in said Court; that he is acquainted with the parties in the above cause; that he has carefully compared the original of the bill of exceptions now among the files of the said Supreme Court of the District of Columbia, a copy of which purports to be set out in the printed records of the above cause beginning on page 9 and ending on page 40 of said printed record, with such purported copy, and that the document, or certificate of organization, dated May 14, 1877, signed by J. S. Langworthy, "Acting Comptroller of the Currency,"

appearing on page 15 of said printed record, is not in the said original, nor is it attached thereto or connected therewith in any way.

WM. A. MCKENNEY.

Subscribed and sworn to before me this 28 day of June, 1889.

R. J. MEIGS, *Cl'k.*

[SEAL.] by L. P. WILLIAMS, *Ass't Cl'k*

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BENJAMIN U. KEYSER, Receiver, &c. } Law,
vs. } No. 22,261.
JANE C. HITZ.

CERTIFICATE OF THE CLERK.

I hereby certify as follows:

That the following is a true and correct transcript of the docket entries in the above entitled cause as they appear on the docket in my office, to wit:

1880, Sept. 17, Deposit toward costs $10, by Elliot, order, &c.
" " " Decl. Notice & affi.. filed Jurat.
" " " Summons (2) & copy of Decl., Notice, affi issued.
" " 18, " " " " " " " served,
" Nov. 2, Appearance of Totten for Deft.3 Pleas & affi. filed, Jurat.
" " 10, Joinder of issue on 1st & 2d pleas, demurrer to 3 plea fied.
1881, Jan'y 8, Joinder in Demurrer to 3 plea filed.
" " 10, Note of Issue, filed. Calendared.
1882, Dec. 9, Demurrer to 3 Plea overruled (M. 18, p. 211.)
1883, Jan'y 11, Replication to 3 Plea, filed.
" " 15, Rejoinder to plff's Replication to 3 Plea filed.
" Feb'y 5, Deft's witnesses Chas. E. Prentiss, R. B. Donaldson 5 days, Wm. F. Mattingly, 5 days.
" " 10, Joinder of issue to Rejoinder to Repl'n to 3 plea filed.
" " 12, Add'l plea filed by leave of court.
" " " Joinder of issue (on add'l plea.
" " " Verdict & judgment for Def't for costs (M.18,p.310.)
" " 20. Fi. fa. issued. Retd. April 5 1883, satisfied.
" M'ch 3, Motion for new trial on exceptions filed & entered. (M. 18, p. 327).

1883, M'ch 3, Bill of exceptions filed & entered (M. 18, p. 327.)
" " " Calander for Gen'l Term.
" Apr. 5, Add'l costs to date of issue of Fi. fa. $4.35, paid by Totten.
" " 27, 10 copies printed, Record filed.
" June 12, Argument commenced, (4, M G. T. p. 472.)
" " 26, Judg't below reversed at Deft's costs, and cause remanded for New Trial. (4 M. G. T. p. 482.)
" Nov. 19, Def't witnesses, Wm. F. Mattingly, 1 day, R. B. Donaldson, 1 day.
" " 21, Jury sworn & respited (M. 18, p. 553.)
" " 22, Verdict & judg't for Def't for costs (M. 18, p. 554.)
" " 23, Motion for New Trial addressed to discretion of Court Filed (M. 18, p. 7.)
" " " Motion for New Trial on exceptions.
" " 24, " " " " addressed to discretion of the court overruled (M. 18, p. 560.)
" Dec. 5, Plt'ffs Bills of Exceptions filed and entered (M. 18, p. —), Calander for G T.
1884, Jan'y 7, 10 copies printed, Record filed.
" M'ch 25, Motion by pla'tff for leave to amend Bill of Exception & affi. in support, filed Jurat.
" " " Motion by pl'tff for leave to amend Bill of Ex. "allowed" by Justice McArthur.
" Dec. 19, Notice of motion filed.
" " 23, Judgment of Special Term affirmed (5 M. G.T. p.137.)
1885, Jan'y 3, Fi. fa. issued, Ret'd M'ch 2 1885, "*Nulla Bona.*"
" " 9, Motion for rehearing in Gen'l Term filed by Pl'tff.
" " 22, " " " " " " overruled (5 M.G. T. p. 155.)
" Dec. 7, Bond for Writ of Error S. C. U. S. with John W. Dick, as surety filed.
" " " Writ of Error to Sup. Ct. U. S. & copy lodged in clerk's office.

That the following Rule of Court fixing the period of holding the terms of the General Term of this Court, and of the special terms thereof (or Circuit Court) at which issues of fact triable by a jury or by the Court are tried, was in force and operation in said court from the year 1875 until the year 1886, to wit:

TERMS OF COURT:

The General Term.
4th Monday of January.
4th Monday of April.
1st Monday of October.

THE CIRCUIT COURT:

4th Monday of January.
2d Monday of May,—which term shall not con-

tinue beyond 3d Saturday in July, except to finish a pending trial

3d Monday of October.

* * * * * * * * *

That the following are the proceedings of the Supreme Court of the District of Columbia, holding a special term and Circuit Court in and for said District of Columbia on the 24th day of January, 1884, to wit:

"Supreme Court of the District of Columbia October Term, 1883.

Thursday January 24th, A. D. 1884.

January 24th, 1884.

Session resumed pursuant to adjournment, MacArthur, Justice presiding.

* * * * * * * * *

* * * * * * * * *

And thereupon the October Term adjourns without day."

That the following are the proceedings of the Supreme Court of the District of Columbia, holding a General Term in and for said District.

"October 1st, 1883.

Proceedings before Supreme Court of the District of Columbia in General Term. Present, Chief Justice Cartter and Justice Hagner and Cox."

* * * * * * * * *

"WEDNESDAY, *March 26th*, 1884.

Session resumed pursuant to adjournment; present, Chief Justice Cartter and Justices Cox and James.

* * * * * * * * *

BENJAMIN U. KEYSER } 76
vs. } ——— Law.
JANE C. HITZ. } 22,261

Argued on behalf of plaintiff by Leigh Robinson and by Mr. Totten, behalf of defendant, until the adjournment of the court.

* * * * * * * * *

"THURSDAY, *March 27th*, 1884.

Session resumed, pursuant to adjournment.

Present: Chief Justice Cartter and Justices Cox and James.

B. U. KEYSER, Receiver, } 76
vs. } ——— Law.
JANE C. HITZ. } 22,261

Argument resumed by Mr. Totten for defendant and by Leigh Robinson; concluded behalf of plaintiff and cause submitted."

I, Return J. Meigs, Clerk of the Supreme Court of the District of Columbia, hereby certify that the foregoing are true and correct copies of the records and entries of which they severally purport to be copies, as the same appear upon the books and records of the office of the clerk of the said Court.

Witness my hand and the seal of the said Supreme Court of the District of Columbia, this 28th day of June, A. D. 1889.

R. J. MEIGS, *Clerk*.

[SEAL.] By R. J. MEIGS, Jr., *Asst*.